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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1945 46

No. 821 41

PYRAMID MOTOR FREIGHT CORPORATION,
PETITIONER,

*vs.*

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 7, 1946.

CERTIORARI GRANTED MARCH 25, 1946.

# SUPREME COURT OF THE UNITED STATES

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[fol. 1]

# IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket # 19-908

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON, Plaintiffs-Appellants,

against

PYRAMID MOTOR FREIGHT CORP., Defendant-Appellee

## STATEMENT UNDER RULE 13

This is an appeal to the United States Circuit Court of Appeals, Second Circuit, from an order of the United States District Court for the Southern District of New York, bearing date the 14th day of February, 1945, and filed in the office of the clerk of the said court on the 19th day of February, 1945, dismissing the complaint herein.

The action which is one to recover from the respondent unpaid overtime wages pursuant to the provisions of the Fair Labor Standards Act of 1938, was commenced in the City Court of the City of New York, County of New York, by the service of a summons and verified complaint (Document # 2) upon the respondent on the 19th day of November, 1942. The respondent thereafter caused the said action to be removed from the said City Court to the United States District Court for the Southern District of New York and the said complaint and the respondent's answer were thereafter filed in the said District Court on the 21st and 31st days of December 1942 respect*fully*.

[fol. 2] All of the appellants except Sam Lanorith and Joseph Gannon were made original party plaintiffs in the said action and by an order (Document 7), dated and filed on the 20th day of April, 1943, they were added as party plaintiffs.

Leon E. Spielvogel, Esq., of 401 Broadway, New York City, appeared as the attorney of the plaintiff-appellants and Charles E. Cotterill, Esq., of 70 East 45th Street, New York City, appeared as the attorney for the defendant respondent.

After the action was removed to the District Court, and on the 16th day of April, 1943, the attorneys for the parties filed with the said court a stipulation dated April 15th, 1943, (Document 6) which amended the complaint by changing certain dates mentioned therein as well as certain sums of money referred to as representing the amount of overtime compensation due and owing from the respondent to the appellants.

On April 20th, 1943, the action regularly came on for trial before Hon. James Alger Fee, a visiting judge from the District of Oregon and in order to carry out either his direction or request that an agreed statement of fact be prepared and submitted in lieu of a trial, same was thereupon adjourned to the 3rd day of May, 1943. On the adjourned date of the trial the attorneys again appeared before the court and by their written stipulation and consent dated April 29th, 1943, submitted to Judge Fee for signature an order which framed all of the issues raised by the pleadings and provided that in lieu of a trial of the said action, that the matter be submitted to the court for its final determination upon an agreed statement of facts contained and set forth at great length in the said order.

Due probably to an oversight on the part of the court, the said order (Document # 8) was never signed and remained unfiled until the 19th day of February, 1945, but it was re- [fol. 3] ceived and accepted by Judge Fee on the said 3rd day of May, 1943, in lieu of a trial and used by him in arriving at the decision which he set forth in an opinion (Document # 9) dated November 29th, 1943, and filed on December 20th, 1943.

The decision made no disposition whatever of the cause, but on the contrary, left it in a state of uncertainty pending certain further proceedings on the part of the appellants.

The proceedings suggested by the said opinion were not undertaken by the appellants and nothing further was done in the matter until June 1944, at which time, Ramey & McKelvey, Esqs., of 501 Fifth Avenue, New York City, who were then retained of counsel to the appellants, wrote several letters to Judge Fee with a view toward obtaining a rehearing in the matter, or in the alternative, causing the opinion to be withdrawn and the cause resubmitted to the District Court on the pleadings and the agreed statement of facts above referred to. Judge Fee refused to act upon this request (Document # 16 filed October, 1944), where-

upon the appellants moved the District Court for a final disposition of the action. This motion (Document #10 filed February 19, 1945) regularly came on for hearing on the 28th day of November, 1944, and was thereupon referred to Judge Fee, who, under date of January 12th, 1945, rendered a decision (Document # 17 filed January 18th, 1945) upon which the order herein appealed from was entered.

The appellants' notice of appeal (Document # 19) was filed on the 2nd day of April, 1945.

The defendant-respondent was not arrested, neither was any bail taken nor property attached. No question of law or fact was referred to any commissioner, master or referee, and there has been no change of either parties or attorneys except as hereinbefore mentioned and set forth.

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[fol. 4] IN CITY COURT OF THE CITY OF NEW YORK, COUNTY OF NEW YORK

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, and LOUIS H. SHAPIRO, Plaintiffs,

against

PYRAMID MOTOR FREIGHT CORP., Defendant

COMPLAINT

Plaintiffs, complaining of the defendant by Leon E. Spielvogel, Esq., their attorney, respectfully show to this Court and allege:

For a First Cause of Action by Murray Ispass:

First: Plaintiff brings this action to recover from defendant unpaid minimum wages and unpaid overtime compensation and an additional equal amount as liquidated damages, pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 52 Stat. 1060), hereinafter referred to as the Act.

Second: Jurisdiction is conferred on this Court by Section 16(b) of the Act. The Act has been in effect since October 24th, 1938.

Third: Upon information and belief, defendant is a corporation organized and existing under and by virtue of the

laws of the State of New York and at all times hereinafter mentioned was engaged in the transportation of goods, [fol. 5] wares and merchandise in interstate commerce. Substantially all of the goods transported by defendant during the times hereinafter mentioned have been produced for interstate commerce, and have been sold, offered for transportation, transported, shipped and delivered in interstate commerce from the defendant's plant and place of business at 323 West 38th Street, New York City and from other points to various points outside the State of New York.

Fourth: During the workweeks beginning October 24th, 1938, and continuing to the present time, defendant has employed approximately sixty individuals in the preparation for, and in transportation of goods, wares and merchandise in interstate commerce. The goods carried by these employees during this period have been produced for interstate commerce and have been sold, offered for transportation, transported, shipped and delivered in interstate commerce from defendant's place of business, as aforesaid, to points outside the State of New York.

Fifth: Plaintiff in his capacity as delivery clerk and "push-boy" was required to perform, and in fact performed, the following tasks, which were part of plaintiff's regular duties throughout the period of his employment:

(a) Transported goods from sources in New York City by hand truck for delivery to their customers, or to defendant's place of business for shipment in interstate commerce.

(b) Delivered by hand truck goods received from both without and within the State of New York and produced as aforesaid from defendant's place of busi- [fol. 6] ness to wholesalers and retailers, and from wholesalers and retailers to defendant's customers.

(c) Sorted goods, produced as aforesaid, at defendant's place of business.

(d) Assisted in the loading and unloading of goods produced as aforesaid, on and from defendant's trucks.

Sixth: These foregoing functions performed by plaintiff are an essential part of the transportation of said goods,

wares and merchandise and are operations necessary to the completion of transportation of such goods. Prior and subsequent to the work which plaintiff performed, a substantial portion of the goods were sold, transported, shipped and delivered in interstate commerce to various points outside the State of New York. Plaintiff's duties constituted the production of goods for commerce within the meaning of the Act, and constituted an essential part of the interstate transportation thereof.

Seventh: That at all times hereinafter mentioned, defendant employed plaintiff in the transportation of goods in interstate commerce, as aforesaid, for workweeks longer than the applicable maximum number of hours prevailing under Section 7 of the Act, and failed and refused to compensate him for such employment in excess of such applicable maximum in such workweeks, at rates not less than one and one-half times the regular rates at which he was employed. The employment of the plaintiff for workweeks in excess of the applicable maximum prevailing under Section 7 of the Act, without compensating him for such excess hours at rates not less than one and one-half times the regu-
[fol. 7] lar rates at which he was employed, was in violation of Section 7 of the Act.

Eighth: During the period between March 15th, 1940, and September 20th, 1941, defendant employed this plaintiff in the capacity of delivery clerk and "push-boy" as hereinabove described.

Ninth: During the period from March 15th, 1940, to October 26th, 1940, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately sixty (60) hours each week and paid wages to plaintiff at the rate of Twenty ($20.00) Dollars per week or the equivalent of Thirty-three and ⅓ ($.33⅓) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-two (42) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-three and ⅓ ($.33⅓) Cents per hour, or at a rate of Fifty ($.50) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Sixteen and ⅔ ($.16⅔) Cents for each hour worked in excess of forty-two (42) hours in each workweek, or the sum of Ninety ($90.00) Dollars for the said period.

Tenth: During the period from October 28th, 1940, to January 24th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-one ($21.00) Dollars per weeks or the equivalent of Thirty-eight and 2/10 ($.38 2/10) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of [fol. 8] forty (40) hours per week, at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-eight and two-tenths (38.2¢) Cents per hour, or at the rate of Fifty-seven and 3/10 (57.3¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Nineteen and 1/10 (19.1¢) Cents for each hour worked in excess of Forty (40) hours in each workweek, or the sum of Thirty-seven and 28/100 ($37.28) Dollars for the said period.

Eleventh: During the period from January 24th, 1941, to September 20th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately Fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-four ($24.00) Dollars per week or the equivalent of Forty-three and 6/10 (43.6¢) Cents per hour, or at the rate of Sixty-five and 4/10 (65.4¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-one and 8/10 (21.8¢) Cents for each hour worked in excess of Forty (40) hours in each workweek, or the sum of One Hundred Eleven and 18/100 ($111.18) Dollars for the said period.

Twelfth: A. That by reason of the foregoing, there is now due and owing to the plaintiff, Murray Ispass, the sum of Two Hundred Thirty-eight and 46/100 ($238.46) Dollars for unpaid overtime compensation, with interest thereon; no part of which has been paid although duly demanded.

B. That pursuant to Section 16(b) of the Act, this plaintiff is entitled to an additional equal amount as liquidated damages.

[fol. 9] For a Second Cause of Action by Max Granofsky:

Thirteenth: Plaintiff, Max Granofsky, repeats, reiterates, and re-alleges each and every allegation contained in the paragraphs marked "First" through "Seventh"

of the first cause of action with the same force and effect as if fully set forth at length herein.

Fourteenth: During the period between August 2nd, 1939 and September 20th, 1941, defendant employed this plaintiff in the capacity of delivery clerk and "push-boy" as hereinabove described.

Fifteenth: During the period from August 2nd, 1939 to September 20th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately sixty-two (62) hours each week and paid wages to plaintiff at the rate of Eighteen ($18.00) Dollars per week or the equivalent of Twenty-nine (29¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-four (44) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Twenty-nine (29¢) Cents per hour, or at a rate of Forty-three and 5/10 (43.5¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Fourteen and 5/10 (14.5¢) Cents for each hour worked in excess of Forty-four (44) hours in each workweek or the sum of Twenty-eight and 71/100 ($28.71) Dollars for the said period.

Sixteenth: During the period from October 23rd, 1939 to October 26th, 1940, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approxi-
[fol. 10] mately Sixty (60) hours each week and paid wages to the plaintiff at the rate of Twenty ($20.00) Dollars per week or the equivalent of Thirty-three and ⅓ (33⅓¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-two (42) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-three and ⅓ (33⅓¢) Cents per hour, or at a rate of Fifty (50¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Sixteen and ⅔ (16⅔¢) Cents for each hour worked in excess of forty-two (42) hours in each workweek, or the sum of One Hundred and Fifty-six ($156.00) — for the said period.

Seventeenth: During the period from October 28th, 1940 to January 24th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid

wages to plaintiff at the rate of Twenty-one ($21.00) Dollars per week or the equivalent of Thirty-eight and 2/10 (38.2¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-eight and 2/10 (38.2¢) Cents per hour, or at the rate of Fifty-seven and 3/10 (57.3¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Nineteen and 1/10 (19.1¢) Cents for each hour worked in excess of forty (40) hours in each workweek, or the sum of Thirty-seven and 28/100 ($37.28) — for the said period.

Eighteenth: During the period from January 24th, 1941 to September 20th, 1941, defendant employed plaintiff in [fol. 11] its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-four ($24.00) Dollars per week or the equivalent of Forty-three and 6/10 (43.6¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Forty-three and 6/10 (43.6¢) Cents per hour, or at the rate of Sixty-five and 4/10 (65.4¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-one and 8/10 (21.8¢) Cents for each hour worked in excess of forty (40) hours in each workweek, or the sum of One Hundred Eleven and 18/100 ($111.18) Dollars for the said period.

Nineteenth: That by reason of the foregoing, there is now due and owing to the plaintiff, Max Granofsky, the sum of Three Hundred Thirty-three and 17/100 ($333.17) Dollars for unpaid overtime compensation, with interest thereon, no part of which has been paid although duly demanded.

Twentieth: That pursuant to Section 16(b) of the Act, this plaintiff is entitled to an additional equal amount as liquidated damages.

For a Third Cause of Action by Harry Brownstein:

Twenty-first: Plaintiff, Harry Brownstein, repeats, reiterates, and re-alleges each and every allegation con-

tained in the paragraphs marked "First" through "Seventh" of the first cause of action with the same force and effect as if fully set forth at length herein.

[fol. 12] Twenty-second: During the period between January 24th, 1941 and September 20th, 1941, defendant employed this plaintiff in the capacity of delivery clerk and "push-boy", as hereinafter described.

Twenty-third: During the period from January 24th, 1941 to September 20th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately Fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-four ($24.00) Dollars per week or the equivalent of Forty-three and 6/10 (43.6¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of Forty (40) hours per week at a rate of not less than one and one-half times plaintiff's regular rate of pay of Forty-three and 6/10 (43.6¢) Cents per hour, or at the rate of Sixty-five and 4/10 (65.4¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-one and 8/10 (21.8¢) Cents for each hour worked in excess of Forty (40) hours in each workweek, or the sum of One Hundred Eleven and 18/100 Dollars for the said period.

Twenty-fourth: A. That by reason of the foregoing, there is now due and owing to the plaintiff, Harry Brownstein, the sum of One Hundred Eleven and 18/100 ($111.18) Dollars for unpaid overtime compensation, with interest thereon; no part of which has been paid although duly demanded.

B. That pursuant to Section 16(b) of the Act, this plaintiff is entitled to an additional equal amount as liquidated damages.

[fol. 13] For a Fourth Cause of Action by Max Berlinsky:

Twenty-fifth: Plaintiff, Max Berlinsky, repeats, reiterates, and re-alleges each and every allegation contained in the paragraphs marked "First" through "Seventh" of the first cause of action with the same force and effect as if fully set forth at length herein.

Twenty-sixth: During the period between September 24th, 1939 and September 20th, 1941, defendant employed this plaintiff in the capacity of delivery clerk and "push-boy" as hereinabove described.

Twenty-seventh: During the period from September 24th, 1939 to October 23rd, 1939, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately sixty-two (62) hours each week and paid wages to plaintiff at the rate of Eighteen ($18.00) Dollars per week or the equivalent of Twenty-nine (29¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of Forty-four (44) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Twenty-nine (29¢) Cents per hour, or at a rate of Forty-three and 5/10 (43.5¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Fourteen and 5/10 (14.5¢) Cents for each hour worked in excess of Forty-four (44) hours in each workweek or the sum of Thirty-one and 32/100 ($31.32) Dollars for the said period.

Twenty-eighth: During the period from October 23rd, 1939 to October 26th, 1940, defendant employed plaintiff in its said plant and place of business, as aforesaid, for [fol. 14] approximately Sixty (60) hours each week and paid wages to the plaintiff at the rate of Twenty ($20.00) Dollars per week or the equivalent of Thirty-three and ⅓ (33⅓) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of Forty-two (42) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-three and ⅓ (33⅓) Cents per hour, or at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-three and one-third (33⅓¢) Cents per hour, or at a rate of Fifty (50¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Sixteen and ⅔ (16⅔) Cents for each hour worked in excess of Forty-two (42) hours in each workweek, or the sum of One Hundred Fifty-six ($156.00) Dollars for the said period.

Twenty-ninth: During the period from October 26th 1940 to January 24th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for

approximately Fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-one ($21.00) Dollars per week or the equivalent of Thirty-eight and 2/10 (38.2¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of Forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-eight and 2/10 (38.2¢) Cents per hour, or at the rate of Fifty-seven and 3/10 (57.3¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Nineteen and 1/10 (19.1¢) Cents for each hour worked in excess of Forty (40) hours in each workweek, or the sum of Thirty-seven and 28/100 ($37.28) Dollars for the said period.

[fol. 15] Thirtieth: During the period from January 24th, 1941 to September 20th, 1941 defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately Fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-four ($24.00) Dollars per week or the equivalent of Forty-three and 6/10 (43.6¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of Forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Forty-three and 6/10 (43.6¢) Cents per hour or at the rate of Sixty-five and 4/10 (65.4¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-one and 8/10 (21.8¢) Cents for each hour worked in excess of Forty (40) hours in each workweek, or the sum of One Hundred Eleven and 18/100 ($111.18) Dollars for the said period.

Thirty-first: a. That by reason of the foregoing, there is now due and owing to the plaintiff, Max Berlinsky, the sum of Three Hundred Thirty-five and 74/100 ($335.74) Dollars for unpaid overtime compensation, with interest thereon; no part of which has been paid although duly demanded.

b. That pursuant to Section 16(b) of the Act, this plaintiff is entitled to an additional equal amount as liquidated damages.

For a Fifth Cause of Action by Carroll Mackler:

Thirty-second: Plaintiff, Carroll Mackler, repeats, reiterates, and re-alleges each and every allegation contained in

the paragraphs marked "First" through "Seventh" of the [fol. 16] first cause of action with the same force and effect as if fully set forth at length herein.

Thirty-third: During the period between October 24th, 1938 to September 20th, 1941, defendant employed this plaintiff in the capacity of delivery clerk and "push-boy" as hereinabove described.

Thirty-fourth: During the period from October 24th, 1938 to January 23rd, 1939, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid wages to plaintiff at the rate of Sixteen ($16.00) Dollars per week or the equivalent of Twenty-nine (29¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-four (44) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Twenty-nine (29¢) Cents per hour, or at a rate of Forty-three and 5/10 (43.5¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Fourteen and 5/10 (14.5¢) Cents for each hour worked in excess of forty-four (44) hours in each workweek or the sum of Twenty and 74/100 ($20.74) Dollars.

Thirty-fifth: During the period from January 24th, 1939 to October 23rd, 1939, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid wages to plaintiff at the rate of Eighteen ($18.00) Dollars per week or the equivalent of Thirty-two and 7/10 (32.7¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of [fol. 17] Forty-four (44) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-two and 7/10 (32.7¢) Cents per hour, or at a rate of Forty-nine (49) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Sixteen and 3/10 (16.3¢) Cents for each hour worked in excess of Forty-four (44) hours in each workweek or the sum of Sixty-nine and 93/100 ($69.93) Dollars for the said period.

Thirty-sixth: During the period from October 23rd, 1939 to October 26th, 1940, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approxi-

mately Fifty-five (55) hours each week and paid wages to the plaintiff at the rate of Twenty ($20.00) Dollars per week or the equivalent of Thirty-six and 4/10 (36.4¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-two (42) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-six and 4/10 (36.4¢) Cents per hour, or at a rate of Fifty-four and 6/10 (54.6¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Eighteen and 2/10 (18.2¢) Cents for each hour in excess of forty-two (42) in each workweek, or the sum of One Hundred Twenty-three and 3/100 ($123.03) Dollars for the said period.

Thirty-seventh: During the period from October 24th, 1940 to January 24th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-one ($21.00) Dollars per week or the equivalent of Thirty-eight and 2/10 (38.2¢) Cents per hour. Under Section 7 of the Act defendant was [fol. 18] required to compensate plaintiff for each hour of work in excess of forty (40) per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Thirty-eight and 2/10 (38.2¢) Cents per hour, or at the rate of Fifty-seven and 3/10 (57.3¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Nineteen and 1/10 (19.1¢) Cents for each hour worked in excess of forty (40) in each workweek or the sum of Thirty-seven and 23/100 ($37.28) Dollars for the said period.

Thirty-eight: During the period from January 24th, 1941 to September 20th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately fifty-five (55) hours each week and paid wages to plaintiff at the rate of Twenty-four ($24.00) Dollars per week or the equivalent of Forty-three and 6/10 (43.6¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of Forty-three and 6/10 (43.6¢) Cents per hour, or at the rate of Sixty-five and 4/10 (65.4¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-one and 8/10 (21.8¢) Cents for each hour worked in excess of

forty (40) hours in each workweek, or the sum of One Hundred Eleven and 18/100 ($111.18) Dollars for the said period.

Thirty-ninth: a. That by reason of the foregoing, there is now due and owing to the plaintiff, Carroll Mackler, the sum of Three Hundred Sixty-two and 16/100 ($362.16) Dollars for unpaid overtime compensation, with interest [fol. 19] thereon; no part of which has been paid although duly demanded.

b. That pursuant to Section 16(b) of the Act, this plaintiff is entitled to an additional equal amount as liquidated damages.

For a Sixth Cause of Action by Louis A. Shapiro:

Fortieth: Plaintiff, Louis H. Shapiro, repeats and reiterates, and re-alleges each and every allegation contained in the paragraphs marked "First" through "Fourth" of the first cause of action with the same force and effect as if fully set forth at length herein.

Forty-first: Plaintiff in his capacity as delivery clerk and "push-boy" was required to perform, and in fact performed, the following tasks, which were part of plaintiff's regular duties throughout the period of his employment.

(a) Transported goods from sources in New York City by hand truck for delivery to their customers, or to defendant's place of business for shipment in interstate commerce.

(b) Delivered by hand truck goods received from both without and within the State of New York and produced as aforesaid from defendant's place of business to wholesalers and retailers, and from wholesalers and retailers to defendant's customers.

(c) Sorted goods, produced as aforesaid, at defendant's place of business.

[fol. 20] (d) Assisted in the loading and unloading of goods produced as aforesaid, on and from defendant's trucks.

(e) Watched defendant's trucks after regular drivers went home and until relief drivers appeared.

(f) Performed certain clerical duties, such as rating and manifesting the day's receipts.

Forty-second: Plaintiff repeats and reiterates paragraphs "Sixth" and "Seventh" of the first cause of action with the same force and effect as if fully set forth at length herein.

Forty-third: During the period between October 24th, 1938 and January 20th, 1941, defendant employed this plaintiff in the capacity of delivery clerk and "push-boy," as hereinabove described.

Forty-fourth: During the period from October 24th, 1938 to October 23rd, 1939, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately sixty (60) hours each week and paid wages to plaintiff at the rate of Twenty-four ($24.00) Dollars per week or the equivalent of forty (40¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-four (44) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of forty (40¢) Cents per hour, or at a rate of sixty (60¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of twenty (20¢) Cents for each hour worked in excess of forty-four (44) hours in each workweek or the sum of One Hundred and Sixty-six and 40/100 ($166.40) Dollars.

[fol. 21] Forty-fifth: During the period from October 23rd, 1939 to October 26th, 1940, defendant employed plaintiff in its said plant and place of business as aforesaid, for approximately sixty (60) hours each week and paid wages to the plaintiff at the rate of Twenty-seven ($27.00) Dollars per week or the equivalent of forty-five (45¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty-two (42) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of forty-five (45¢) Cents per hour, or at a rate of sixty-seven and 5/10 (67.5¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-two and 5/10 (22.5¢) Cents for each hour worked in excess of forty-two (42) hours in each workweek, or the sum of Two Hundred Ten and 60/100 ($210.60) Dollars for the said period.

Forty-sixth: During the period from October 26th, 1940 to January 24th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately sixty (60) hours each week and paid wages to plaintiff at the rate of Twenty-seven ($27.00) Dollars per week or the equivalent of forty-five (45¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of forty-five (45¢) Cents per hour, or at the rate of Sixty-seven and 5/10 (67.5¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of Twenty-two and 5/10 (22.5¢) Cents for each hour worked in excess of forty (40) hours in each workweek or the sum of Fifty-eight and 50/100 ($58.50) Dollars for the said period.

[Vol. 22] Forty-seventh: During the period from January 24th, 1941 to September 20th, 1941, defendant employed plaintiff in its said plant and place of business, as aforesaid, for approximately sixty (60) hours each week and paid wages to plaintiff at the rate of Thirty ($30.00) Dollars per week or the equivalent of fifty (50¢) Cents per hour. Under Section 7 of the Act defendant was required to compensate plaintiff for each hour of work in excess of forty (40) hours per week at a rate not less than one and one-half times plaintiff's regular rate of pay of fifty (50¢) Cents per hour, or at the rate of seventy-five (75¢) Cents for each overtime hour. Plaintiff was accordingly underpaid the sum of twenty-five (25¢) Cents for each hour worked in excess of forty (40) hours in each workweek, or the sum of One Hundred and Seventy ($170.00) Dollars for the said period.

Forty-eighth: A. That by reason of the foregoing, there is now due and owing to the plaintiff, Louis H. Shapiro, the sum of Six Hundred and Five ($605.00) Dollars for unpaid overtime compensation, with interest thereon, no part of which has been paid although duly demanded.

B. That pursuant to Section 16(b) of the Act, this plaintiff is entitled to an additional equal amount as liquidated damages.

Wherefore, the plaintiffs pray that judgments be entered against the defendant, Pyramid Motor Freight Corp., and

in favor of plaintiff, Murray Ispass, in the amount of Two Hundred Thirty-eight and 46/100 ($238.46) Dollars for unpaid overtime compensation, and for an additional equal amount as liquidated damages; in favor of plaintiff, Max Granofsky, in the amount of Three Hundred Thirty-three [fol. 23] and 17/100 ($333.17) Dollars for unpaid overtime compensation, and for an additional equal amount as liquidated damages; in favor of plaintiff, Harry Brownstein in the amount of One Hundred Eleven and 8/100 ($111.08) Dollars for unpaid overtime compensation, and for an additional equal amount as liquidated damages; in favor of plaintiff Max Berlinsky, in the amount of Three Hundred Thirty-five and 74/100 ($335.74) Dollars for unpaid overtime compensation and for an additional equal amount as liquidated damages; in favor of plaintiff, Carroll Mackler, in the amount of Three Hundred Sixty-two and 16/100 ($362.16) Dollars for unpaid overtime compensation and for an additional equal amount as liquidated damages; in favor of plaintiff, Louis H. Shapiro, in the amount of Six Hundred Five and 50/100 ($605.50) Dollars for unpaid overtime compensation, and for an additional equal amount as liquidated damages, together with costs and disbursements, average interest from the 1st day of February, 1940, and that the Court allow a reasonable attorney's fee to be paid by the defendant.

Leon E. Spielvogel, Attorney for Plaintiffs, Office & P. O. Address, 401 Broadway, Borough of Manhattan, City of New York.

Filed Dec: 21, 1942. U. S. Dist. Ct. S. D. N. Y.

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[fol. 24] In United States District Court, Southern District of New York

Civil Action No. 20-145

Answer

Defendant, Pyramid Motor Freight Corporation, by its attorney, Charles E. Cotterill, Esq., for answer to the petition herein respectfully shows:

As to the First Alleged Cause of Action:

The allegations of paragraphs first, second, third, and fourth are admitted except that it says the number of its

employees described in paragraph fourth considerably exceeded sixty individuals.

The allegations of paragraphs fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth are denied.

As to the Second Alleged Cause of Action:

As to the second alleged cause of action for answer to paragraph thirteenth the defendant says that insofar as it reiterates and realleges the allegations of paragraphs first, second, third, and fourth such allegations are admitted but those with respect to paragraphs fifth, sixth, and seventh are denied.

The allegations of paragraphs fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth are denied.

[fol. 25] As to the Third Alleged Cause of Action:

In answering the allegations of paragraphs twenty-first the defendant says that insofar as it repeats, reiterates and realleges the allegations of paragraphs first, second, third, fourth, they are admitted but as to the reiterations and reallegations of paragraphs fifth, sixth, seventh, they are denied.

The allegations of paragraph- twenty-second, twenty-third, and twenty-fourth are denied.

As to the Fourth Alleged Cause of Action:

In answering the allegations of paragraph twenty-fifth, the defendant says that insofar as it reiterates and realleges the allegations contained in paragraphs first, second, third, and fourth they are admitted. But insofar as it reiterates and realleges the allegations of paragraphs fifth, sixth, and seventh they are denied.

The allegations of paragraphs twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, and thirty-first are denied.

As to the Fifth Alleged Cause of Action:

In answering the allegations of paragraph thirty-second the defendant says that insofar as it reiterates and realleges the allegations of paragraphs first, second, third, and fourth they are admitted. But insofar as it reiterates and re-

alleges the allegations of paragraphs fifth, sixth, and seventh they are denied.

The allegations of paragraphs thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth are denied.

[fol. 26] As to the Sixth Alleged Cause of Action:

The allegations of paragraph fortieth are admitted.

The allegations of paragraphs forty-first, forty-second, forty-third, forty-fourth, forty-fifth, forty-sixth, forty-seventh, and forty-eighth are denied.

For separate and special defense defendant says that at all times mentioned in the complaint the defendant was a common carrier of property for hire engaged almost wholly in the transportation of general freight commodities in interstate and foreign commerce; that the labor performed by each of the plaintiffs for and in behalf of the defendant consisted primarily of that of driver's helper and of loader; and that by virtue thereof such occupations were at all times mentioned in the complaint exempt from the provisions of the Fair Labor Standards Act of 1938.

Wherefore, it is respectfully prayed that the complaint be dismissed without costs to the defendant.

Charles E. Cotterill, Attorney for Defendant, P. O. Address: 70 East 45th Street, New York, N. Y.

Filed Dec. 31, 1942. U. S. Dist. Ct. S. D. N. Y.

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[fol. 27] In United States District Court

[Title omitted]

Stipulation as to Amended Complaint

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the complaint in the above entitled action be amended in respect to the following allegations:

Paragraph "Ninth", second line, October 26, 1940, be amended and changed and to now read October 24, 1940.

Paragraph "Tenth," first line, October 28, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Fifteenth," second line, September 20, 1941, be amended and changed and to now read October 23, 1939. Paragraph "Sixteenth" first line, October 23, 1939 be amended and changed and to now read October 24, 1939. Paragraph "Sixteenth," second line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Seventeenth," first line, October 28, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Twenty-second," first line, January 24, 1941, be amended and changed and to now read October 24, 1940. Paragraph "Twenty-second," second line, September 20, 1941, be amended and changed and to now read September 1, 1941. Paragraph "Twenty-third," first line, January 24, 1941, be amended and changed and to now read October 24, 1940. Paragraph "Twenty-third," second line, September 20, [fol. 28] 1941, be amended and changed and to now read September 1, 1941. Paragraph "Twenty-third," last line, $111.18 be amended and changed and to now read $144.80. Paragraph "Twenty-fourth A," third line, $111.18 be amended and changed and to now read $144.80. Paragraph "Twenty-eighth," second line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Twenty-ninth," first line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Thirty-sixth," first line, October 23, 1939, be amended and changed and to now read October 24, 1939. Paragraph "Thirty-sixth," second line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Thirty-seventh," first line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Forty-fourth," second line, October 23, 1939 be amended and changed and to now read Octomer 24, 1939. Paragraph "Forty-fifth," first line, October 23, 1939, be amended and changed and to now read October 24, 1939. Paragraph "Forty-fifth," second line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Forty-sixth," first line, October 26, 1940, be amended and changed and to now read October 24, 1940. Paragraph "Forty-eighth A," third line, $605.50. In the prayer for relief in respect to the amount demanded for

Harry Brownstein, 10th line, $111.08 be amended and changed and to now read $144.80.

Dated: New York City, April 15, 1943.

(Sgd.) Leon E. Spielvogel, Attorney for Plaintiffs.
Charles E. Cotterill, Attorney for Defendant.

Filed Apr. 16, 1943. U. S. Dist. Ct. S. D. N. Y.

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[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ADDING PARTIES—April 20, 1943

Upon the annexed consent of the attorneys for the respective parties, and upon the waiver of notice of settlement of order, and upon motion of Leon E. Spielvogel, Esq., attorney for the plaintiffs, it is

Ordered that upon the trial of this action that Sam Lanorith and Joseph Gannon be added as parties plaintiffs, with the same force and effect as though they had been named in the original summons and complaint herein at the time of the commencement of this action, and it is further

Ordered that as and for a cause of action in behalf of the said plaintiff, Sam Lanorith, that all of the allegations contained in the "Second Cause of Action" set up in the original complaint in behalf of the plaintiff, Max Granofsky, be set forth at length as that of the plaintiff, Sam Lanorith, except as to the dates and figures set forth in said cause of action, and that as — this said plaintiff, Sam Lanorith, the said dates and figures substantially are as follows:

[fol. 30] A. That the period of employment was between September 25, 1939, and October 24, 1939. Defendant employed the said plaintiff for approximately 62 hours per week during this period. That he was paid $18.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 44 hours per week, and therefore, plaintiff is entitled to 18 hours overtime during this period.

B. That the period of employment was between October 24, 1939, and September 1, 1940. Defendant employed the

said plaintiff for approximately 60 hours per week during this period. That he was paid $18.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 42 hours per week, and therefore, plaintiff is entitled to 18 hours overtime during this period.

C. That the period of employment was between September 1, 1940, and October 24, 1940. Defendant employed the said plaintiff for approximately 55 hours per week during this period. That he was paid $21.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 44 hours per week, and therefore, plaintiff is entitled to 11 hours overtime during this period.

D. That the period of employment was between October 24, 1940, and January 1, 1941. Defendant employed the said plaintiff for approximately 55 hours per week during this period. That he was paid $21.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 40 hours per week, and therefore, plaintiff is entitled to 15 hours overtime during this period.

E. That the period of employment was between January 1, 1941, and September 1, 1941. Defendant employed the [fol. 31] said plaintiff for approximately 55 hours per week during this period. That he was paid $24.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 40 hours per week, and therefore, plaintiff is entitled to 15 hours overtime during this period.

That there is due and owing to the plaintiff, Sam Lanorith on his cause of action the sum of $288.93 for unpaid overtime compensation with interest thereon, and also pursuant to Section 16B of the act, this plaintiff is entitled to an additional equal amount as liquidated damages, and it is further

Ordered that as and for a cause of action in behalf of the said plaintiff, Joseph Gannon, that all of the allegations contained in the "Second Cause of Action" set up in the original complaint in behalf of the plaintiff, Max Granofsky, to be set forth at length as that of the plaintiff, Joseph Gannon, except as to the dates and figures set forth in said cause of action, and that as to this said plaintiff, Joseph Gannon, the said dates and figures substantially are as follows:

A. That the period of employment was between October 24, 1939, and October 24, 1940. Defendant employed the said plaintiff for approximately 60 hours per week during this period. That he was paid $24.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 42 hours per week, and therefore, plaintiff is entitled to 18 hours overtime during this period.

B. That the period of employment was between October 26, 1940, and March 1, 1941. Defendant employed the said plaintiff for approximately 55 hours per week during this period. That he was paid $24.00 per week during this period. That, pursuant to Section 7 of the act, the overtime [fol. 32] was in excess of 40 hours per week, and therefore, plaintiff is entitled to 15 hours overtime during this period.

C. That the period of employment was between March 1, 1941, and September 1, 1941. Defendant employed the said plaintiff for approximately 55 hours per week, during this period. That he was paid $27.00 per week during this period. That, pursuant to Section 7 of the act, the overtime was in excess of 40 hours per week, and therefore, plaintiff is entitled to 15 hours overtime during this period.

That there is due and owing to the plaintiff, Joseph Gannon on his cause of action the sum of $345.61 for unpaid overtime compensation with interest thereon, and also pursuant to Section 16B of the act, this plaintiff is entitled to an additional equal amount as liquidated damages.

That the answer of the defendant in respect to the causes of action in behalf of the plaintiffs, Sam Lanorith and Joseph Gannon, is substantially the same as set forth in respect to the cause of action of each of the original plaintiffs. The denials intending to set up the same issue in respect to these issues, is the same as the issues set up in respect to the cause of action of each of the original plaintiffs, and it is further.

Ordered that the names of Sam Lanorith and Joseph Gannon be added to the summons and complaint herein, and that the cause of action for each of these plaintiffs is substantially as hereinabove set forth, and that the testimony in the trial hereof be deemed offered in their behalf in addition to the other parties plaintiffs, and that the clerk

of this Court is hereby ordered to mark his records in this case accordingly.

James Alger Fee, U. S. D. J.

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[fol. 33] STIPULATION

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that upon the trial of this action, the foregoing proposed order may be presented for signature by the Justice presiding thereat, and that notice of settlement thereof is hereby waived.

Leon E. Spielvogel, Attorney for Plaintiffs; Chas. E. Cotterill, Attorney for Defendant.

Filed Apr. 20, 1943. U. S. Dist. Ct. S. D. N. Y.

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[fol. 34] IN UNITED STATES DISTRICT COURT

ORDER RE ADMISSIONS

Upon reading and filing the annexed consent of the attorneys for the respective parties hereto, it is

Ordered that the following matters are admitted as to the issues framed by the complaint herein and the answer to the complaint.

I. That this is an action brought under, and by virtue of, the Fair Labor Standards Act, 1938, 29 U. S. C. A., sections 201-219.

II. The complaint contains six causes of action for wages alleged to be due plaintiffs from defendant. The complaint was subsequently amended by an order, based on a stipulation, to include the causes of action of two additional plaintiffs.

III. The defendant was engaged in "commerce", within the purview of section 3 of the Act.

IV. The plaintiffs were engaged in "commerce" or in the "production of goods for commerce" within the purview of section 3 of the Act.

V. The defendant did not pay the plaintiffs any overtime compensation.

[fol. 35] VI. The parties have entered into the following stipulation of facts which have been agreed to be the facts upon which this action is based:

"The parties hereto, represented by their respective attorneys, hereby enter into the following stipulation of facts:

Item 1. The defendant is a common carrier of property for hire by a motor vehicle in interstate and foreign commerce. It operates approximately 190 motor vehicles. Its principal operations are those between Wilmington, Delaware, and Philadelphia on the South and New York City and the Metropolitan New York District on the North. It is so authorized to operate by the Interstate Commerce Commission under a certificate of public convenience and necessity. It is privileged to transport what are termed "commodities generally."

Item 2. The defendant's main terminal in New York City is on West 11th Street, Manhattan Island. For the purpose of better serving its numerous customers in what is known as the Garment Center of New York City, it has long maintained a sub-terminal at 323 West 38th Street at which northbound freight for delivery in the Garment Center has been brought and southbound freight originating in the Garment Center leaves.

Item 3. As to northbound freight the loaded vehicles would come into New York in the very early morning hours to the West 11th Street Terminal where new drivers took charge of the vehicles, and what were called downtown helpers rode on the vehicles with the drivers to the 38th [fol. 36] Street Terminal. At such terminal the doors of the trucks were opened in the mornings, both the driver and downtown helper remaining on the vehicles. As the downtown helper pushed the freight packages over the tailboards they were received by the plaintiffs, who then placed the freight packages in the sub-terminal building. Still later in the mornings the plaintiffs then delivered the packages to various consignees in the Garment Center, generally using for that purpose what are called hand-trucks or flat trucks, using their own manpower for propulsion.

During those same days other northbound trucks after first stopping at the West 11th Street main terminal to

change a driver and receive a downtown helper, by-passed the West 38th Street sub-terminal and parked first at one place and then another alongside the curbs in the Garment Center. At those places the unloading operation was performed in the same way as at the sub-terminal hereinabove described, and the plaintiffs then made the deliveries by hand or by hand trucks into the insides of the Garment Center buildings.

Item 4. In the late afternoons and early evenings freight originating with various consignors at various locations in the Garment Center was "picked up" for intended delivery the next morning in Philadelphia or elsewhere south of New York. As to these southbound operations the facts were these: Some of the freight packages would be picked up by the plaintiffs at the consignor's places of business in the Garment Center and hand-trucked by them to the West 38th Street sub-terminal. At that place the plaintiffs themselves did, in due course, physically load the freight packages into a waiting truck which, when loaded, took up this journey first to the West 11th Street main terminal, and [fol. 37] then with a new driver went on to the destinations south of New York. A downtown employee other than the plaintiffs would also at the same time so load the vehicles.

Other trucks for southbound loadings took their stations on the public streets in the Garment Center where the plaintiffs brought the packages by hand or by hand truck. The part which the plaintiffs took in such loading consisted of the lifting of the packages on to the tailboards of the trucks, and very often when the weights or size of the packages so required they would stand inside the truck bodies and, together with the downtown employee, stack and pile the freight in the vehicle.

Item 5. As to all the plaintiffs other than Shapiro they generally walked between stopping points but occasionally rode upon the trucks when the trucks moved from one place to another in the Garment Center, thereby avoiding loss of time by walking. As to the plaintiff Shapiro, he regularly and as a matter of fixed duty, between August 1939 and September 1, 1941, rode on the truck between four and five hours daily. On the truck at the same time was the driver and a helper from the downtown terminal. In addition thereto the plaintiff Shapiro devoted three and a half hours each day to inside office work at the 38th Street sub-terminal.

Item 6. For the purposes of this case and for this case only it is agreed that the work period of each plaintiff each week was 54 hours, except as to plaintiff Shapiro, whose work hours, it is agreed, was 58, in consideration of which each was employed at a fixed weekly wage.

It is further agreed that the foregoing constitutes a description of the entire duties of the plaintiffs."

[fol. 38] VII. The hours worked by the plaintiffs and their regular weekly compensation are as shown in Exhibits 1-8 inclusive.

VIII. It is agreed that if the plaintiffs are entitled to recover, a reasonable attorney's fee shall be fixed by the Court.

IX. It is agreed that if plaintiffs are entitled to recover for overtime claimed due, plaintiffs are also entitled to recover double said amount as liquidated damages, in accordance with Section 16 (b) of the Wage and Hour Act.

It is further ordered that the contested issues to be submitted to the Court for determination in connection with the issues framed by this pre-trial order are as follows:

I. Plaintiffs contend that they are covered by the Fair Labor Standards Act of 1938, and particularly by section 7 (a) thereof.

II. Defendant contends that plaintiffs are not covered by the Act and are specifically exempt from the provisions of section 7 (a) by section 13 (b) (1) thereof.

This issue involves a mixed question of law and fact to be determined at the trial.

It is agreed by counsel for both parties and by the Court that the decisions of the Interstate Commerce Commission and the Interpretive Bulletins and other rulings of the Administrator under the Fair Labor Standards Act are not binding upon the Court, but shall be considered by the Court in the determination of the issues raised herein; the Court to give such rulings the consideration required of them by law.

[fol. 39] The foregoing is certified to be a record of the proceedings had at the pre-trial of this cause, and it is

Ordered that the issues to be tried herein shall be those herein set forth as controverted issues.

Dated and entered this —— day of ———, 1943.

—— —. ——, U. S. D. J.

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Notice of settlement of foregoing order is hereby waived, and consent to signing same is hereby made.

Dated: April 29, 1943.

(S.) Leon E. Spielvogel, Attorney for Plaintiffs;

Charles E. Cotterill, Attorney for Defendant.

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[fol. 40]

EXHIBIT No. 1

Murray Ispass

| Period of Employment | Weekly Wage | Hours Per Week | Hours overtime | In Excess Of | Hourly Wage | Weeks in Period | Overtime Compensation due | Total |
|---|---|---|---|---|---|---|---|---|
| Aug. 1, 1940 to Sept. 1, 1940 | $18 | 54 | 12 | 42 | $.33⅓ | 4 | $8.00 | |
| Sept. 1, 1940 to Oct. 24, 1940 | 21 | 54 | 12 | 42 | .388 | 8 | 18.62 | |
| Oct. 24, 1940 to Jan. 1, 1941 | 21 | 54 | 14 | 40 | .388 | 10 | 27.16 | |
| Jan. 1, 1941 to Sept. 1, 1940 | 24 | 54 | 14 | 40 | .444 | 34 | 105.67 | |
| | | | | | | | | $159.45 |

EXHIBIT No. 2

Max Granofsky

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Oct. 7, 1939 to Oct. 24, 1939 | 20 | 54 | 10 | 44 | .37 | 2 | 3.70 | |
| Oct. 24, 1939 to Sept. 1, 1940 | 20 | 54 | 12 | 42 | .37 | 44 | 97.68 | |
| Sept. 1, 1940 to Oct. 24, 1940 | 21 | 54 | 12 | 42 | .388 | 8 | 18.62 | |
| Oct. 24, 1940 to Jan. 1, 1941 | 21 | 54 | 14 | 40 | .388 | 10 | 27.16 | |
| Jan. 1, 1941 to Sept. 1, 1941 | 24 | 54 | 14 | 40 | .444 | 34 | 105.67 | |
| | | | | | | | | $252.83 |

[fol. 41]

EXHIBIT No. 3

Harry Brownstein

| Period of Employment | Weekly Wage | Hours Per Week | Hours over-time | In Excess Of | Hourly Wage | Weeks in Period | Overtime Compensation due | Total |
|---|---|---|---|---|---|---|---|---|
| Oct. 12, 1940 to Oct. 24, 1940 | 21 | 54 | 12 | 42 | .388 | 2 | 4.66 | |
| Oct. 24, 1940 to Jan. 1, 1941 | 21 | 54 | 14 | 40 | .388 | 10 | 27.16 | |
| Jan. 1, 1941 to Sept. 1, 1941 | 24 | 54 | 14 | 40 | .444 | 34 | 105.67 | |
| | | | | | | | | $137.49 |

EXHIBIT No. 4

Max Berlinsky

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Aug. 24, 1939 to Oct. 24, 1939 | 18 | 54 | 10 | 44 | .33⅓ | 7 | 11.67 | |
| Oct. 24, 1939 to Sept. 1, 1940 | 20 | 54 | 12 | 42 | .37 | 44 | 97.68 | |
| Sept. 1, 1940 to Oct. 24, 1940 | 21 | 54 | 12 | 42 | .388 | 8 | 62 | |
| Oct. 24, 1940 to Jan. 1, 1941 | 21 | 54 | 14 | 40 | .388 | 10 | 27.16 | |
| Jan. 1, 1941 to Sept. 1, 1941 | 24 | 54 | 14 | 40 | .444 | 34 | 105.67 | |
| | | | | | | | | $260.18 |

EXHIBIT No. 5

Carroll Mackler

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Oct. 24, 1938 to Oct. 24, 1939 | 18 | 54 | 10 | 44 | .33⅓ | 52 | 86.67 | |

[fol. 42]

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Oct. 24, 1939 to Sept. 1, 1940 | 20 | 54 | 12 | 42 | .37 | 44 | 97.68 | |
| Sept. 1, 1940 to Oct. 24, 1940 | 21 | 54 | 12 | 42 | .388 | 8 | 18.62 | |
| Oct. 24, 1940 to Jan. 1, 1941 | 21 | 54 | 14 | 40 | .388 | 10 | 27.16 | |
| Jan. 1, 1941 to Sept. 1, 1941 | 24 | 54 | 14 | 40 | .444 | 34 | 105.67 | |
| | | | | | | | | $335.80 |

EXHIBIT No. 6

Louis H. Shapiro

| Period of Employment | Weekly Wage | Hours Per Week | Hours over-time | In Excess Of | Hourly Wage | Weeks in Period | Overtime Compensation due | Total |
|---|---|---|---|---|---|---|---|---|
| Oct. 24, 1938 to Oct. 24, 1939 | 24 | 58 | 14 | 44 | .414 | 52 | 160.70 | |
| Oct. 24, 1939 to Jan. 1, 1940 | 24 | 58 | 16 | 42 | .414 | 9 | 29.81 | |
| Jan. 1, 1940 to Oct. 24, 1940 | 27 | 58 | 16 | 42 | .466 | 42 | 156.58 | |
| Oct. 24, 1940 to Jan. 1, 1941 | 27 | 58 | 18 | 40 | .466 | 10 | 41.94 | |
| Jan. 1, 1941 to Sept. 1, 1941 | 30 | 58 | 18 | 40 | .518 | 34 | 158.51 | |
| | | | | | | | | $537.54 |

[fol. 43]

EXHIBIT No. 7

Sam Lanorith

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Sept. 25, 1939 to Oct. 24, 1939 | 18 | 54 | 10 | 44 | .33⅓ | 4 | 6.67 | |
| Oct. 24, 1939 to Sept. 1, 1940 | 18 | 54 | 12 | 42 | .33⅓ | 44 | 88.20 | |
| Sept. 1, 1940 to Oct. 24, 1940 | 21 | 54 | 12 | 42 | .388 | 8 | 18.62 | |
| Oct. 24, 1940 to Jan. 1, 1941 | 21 | 54 | 14 | 40 | .388 | 10 | 27.16 | |
| Jan. 1, 1941 to Sept. 1, 1941 | 24 | 54 | 14 | 40 | .444 | 34 | 105.67 | |
| | | | | | | | | $246.12 |

EXHIBIT No. 8

Joseph Gannon

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Oct. 24, 1939 to Oct. 24, 1940 | 24 | 54 | 12 | 42 | .444 | 52 | 148.53 | |
| Oct. 24, 1940 to Mar. 1, 1941 | 24 | 54 | 14 | 40 | .444 | 18 | 55.94 | |
| Mar. 1, 1941 to | 27 | 54 | 14 | 40 | .50 | 26 | 91.00 | |
| | | | | | | | | $295.47 |

[fol. 44] Method of Computation

In each case, the weekly wage was divided by the number of hours per week to give the hourly wage. The number of hours overtime was then multiplied by half the hourly wage to give weekly overtime compensation due. This product was then multiplied by the number of weeks in the period to give this compensation due for the various work-periods.

Between October 24, 1938 and October 24, 1939 time worked in excess of 44 hours per week is considered "over-time."

Between October 24, 1939 and October 24, 1940, time worked in excess of 42 hours is considered "over-time."

After October 24, 1940, time worked in excess of 40 hours is considered overtime.

Example

Between January 1, 1941 and September 1, 1941, Sam Lanorith worked 54 hours per week and received a weekly wage of $24.00. Since time worked in excess of 40 hours during this period is considered "over-time," he worked 14 hours "over-time" during this period.

$24 divided by 45 hours = $.444 which represents the hourly wage.

14 hours overtime multiplied by ½ of $.444 ($.222) equals weekly overtime compensation due (time and *a half*) in this case, 14 × $.222 = $3.108.

This product multiplied by the number of weeks in the period between January 1, to September 1, 1941 (34 weeks), equals overtime compensation due for this period. In this case $3.108 × 34 = $105.67.

Filed Feb. 19, 1945. U. S. Dist. Ct. S. D. N. Y.

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[fol. 45] In the District Court of the United States for the Southern District of New York

Civil Action No. 20-145

Opinion—November 29, 1943

The plaintiffs in this case are employees of defendant which is a common carrier for hire of freight by motor between various cities of the east coast in interstate com-

merce. Plaintiffs assisted in loading and unloading trucks of defendant from and on the sidewalks of the "garment center," and at and near the subterminal maintained by defendant at 38th Street in New York City. This action is brought under the provisions of the Fair Labor Standards Act, since plaintiffs claim they were not paid for overtime according to the rubric thereof.

The difficulty with the case at the outset lies in the fact that the defendant is under the jurisdiction of the Interstate Commerce Commission for most purposes. Unquestionably, that body also prima facie had the power to regulate in the first instance, at least, the maximum hours of the employees of defendant under §204(a) (1); 49 U. S. C. A. 304(a)-(1). But in the opinion of the Commission under the title "Jurisdiction over Employees of Motor Carriers", 13 M. C. C. 481, that body construing the statute in the light of the facts and guided by legislative policy, held that they had the "power" to regulate only the maximum hours of those employees whose activities directly affect the safety [fol. 46] of the operation of motor vehicles in interstate and foreign commerce. The Supreme Court of the United States, in a different proceeding, virtually affirmed the construction placed upon the Act by the Commission. United States v. American Trucking Associations, Inc., 310 U. S. 534, 543.

Where a governmental policy has been declared legislatively and the enforcement is committed to an administrative body so far as possible, the courts should permit that body to interpret the facts in the light of the policy in the first instance. The courts should not struggle for primary jurisdiction in such a field. Nor should primary enforcement of the policy be hindered by judicial interference, unnecessarily. No doubt the courts should retain the power of review of governmental action to prevent the expansion of the executive power unwarranted by statute. Particularly should this be true regarding jurisdictional questions and construction of the statute as to inclusion and exclusion of states of fact. But, at the outset, the determination should generally be made by the administrative body.

In the opinion above cited [1] the Commission, after stating

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[1] Jurisdiction over Employees of Motor Carriers, 13 M. C. C. 481, 488.

the test as above, said that drivers were certainly within the class over which power could be exercised, and proceeded as follows:

> "It may well be that the activities of some employees other than drivers likewise affect the safety *of operation of motor vehicles engaged in interstate and foreign commerce.* If common and contract carriers, or private carriers of property, or their employees believe that the activities of employees other than drivers affect [fol. 47] the safety of operation of motor vehicles engaged in interstate and foreign commerce, they may file an appropriate petition, asking that a hearing be held and the question determined."

This case involves the negative of that proposition. Here the employees are contending that they, although employed by such a carrier, are not within the jurisdiction of the Commission. But if the question of inclusion is one for the Commission, demonstrably the question of exclusion is for the Commission also. This process in either phase is not the textual construction of a statute, but the interpretation of a policy in the light of the facts, limited by the statute. The Commission has excluded certain employees but has included "helpers" and "loaders" at the terminals.

The plaintiffs, generally speaking, bring goods in carriers or push carts from the loft buildings of the garment center to the trucks and pass these to the persons who ride with the trucks and stow the goods therein, in the loading operation. On unloading, plaintiffs receive goods from such persons, place them in push carts or carriers and deliver these to loft buildings, where the garment makers are housed. Plaintiffs, with one exception, do not ride on the motor vehicles, but occasionally enter therein to assist either in unloading or loading. One of plaintiffs for some period of time, rode on a truck and assisted in loading and unloading for four or five hours a day as a part of his regular duty.

The Commission included "loaders" within their jurisdiction, saying in part,

> "'The large carriers, however, and particularly those who have important operations from terminal, employ men variously called loaders, dockmen, or helpers, and [fol. 48] hereinafter called loaders, whose sole duties

are to load and unload motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse."

"The evidence makes it entirely clear that a motor vehicle must be properly loaded to be safely operated on the highways of the country. If more weight is placed on one side of the vehicle that on the other, there is a tendency to tip when rounding curves. If more weight is placed in the rear of the vehicle, the tendency is to raise the front wheels and make safe operation difficult. Further, it is necessary that the load be distributed properly over the axles of the motor vehicles."[2]

The Commission included armed guards and conductorettes as employees essential to the safety of the operation of motor vehicles transporting property and persons in interstate and foreign commerce. There were three concurring opinions. One of these questioned the inclusion of conductorettes and guards. Two questioned inclusion of mechanics and loaders. The commission says:

"We believe that it is neither necessary nor practicable to draw fine distinctions between the work done by the various employees who ride on the motor vehicle in other capacities than that of driver. To some extent at least they all engage in activities which directly affect safety of operation. An attempt to limit our jurisdiction over them in accordance with [fol. 49] the degree in which they engage in such activities would create confusion and continual controversy. They will be included in the category of helpers."[3]

If such fine distinctions are not to be employed in dealing with those who ride upon the vehicle, why should the court hold such distinctions should be applied in dealing with "loaders" "in a law drawn to meet many needs of a major occupation."[4].

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[2] In the Matter of Maximum Hours of Service of Motor Carrier Employees, 28 M. C. C. 125, 136.

[3] In the Matter of Maximum Hours of Service of Motor Carrier Employees, *supra* 134.

[4] *United States* v. *American Trucking Association*, *supra*, 542-3.

The duties of "loaders" are so closely akin to the duties performed by plaintiffs, as above outlined, that it may well be contended that the Commission intended to exercise power over the class to which plaintiffs belong also. At least plaintiffs can only be excluded by drawing the fine distinctions which are denounced in the opinion above quoted. The question of whether the functions of plaintiffs affect the safety of operation is peculiarly a question of fact requiring technical knowledge for its solution.

The Commission also found "that no employees * * * other than drivers" and mechanics, loaders and helpers "perform duties which directly affect the safety of operation."[5] This might be construed as a direct exclusion by the Commission of office employees of the class of rate clerks. Therefore, the indicated solution is to allow the Commission to deal with the situation primarily subject to appropriate review by the courts.

[fol. 50] In *Missel* v. *Overnight Motor Transportation Co., Inc.*,[6] plaintiff, who was a rate clerk of a common carrier of freight in interstate commerce by motor vehicle, brought action under the Fair Labor Standards Act for overtime wages. It was held, on motion to dismiss, over the contention that primary jurisdiction to determine the question lay in the Commission, that the motion should be overruled. A rate clerk, obviously, has less direct connection with operation than a "dispatcher". The Commission found regarding a dispatcher that:

> "The dispatchers do no mechanical work on the motor vehicles, nor do they load or unload. They are not drivers, and they do not accompany the drivers while the motor vehicles are operated in interstate or foreign commerce."[6a]

Actually, the Commission had already determined that power over this class of employees did not exist.

In *West* v. *Smoky Mountains Stages, Inc.*,[7] the court independently came to the conclusion that the activities of

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[5] In the Matter of Maximum Hours of Service of Motor Carrier Employees, *supra*, 139.

[6] 36 F. Supp. 980.

[6a] In the Matter of Maximum Hours of Service of Motor Carrier Employees, *supra*, 135.

[7] 40 F. Supp. 296, 297.

a mechanic "did affect the safety of operation of the busses * * * being operated in interstate commerce", but as the opinion shows, the Commission had already concluded the controversy with respect to this class of employees.

In *Magann* v. *Long's Baggage Transfer Co., Inc.*,[8] the [fol. 51] court expressly refused to follow certain indicated findings of the Commission and the Wage and Hour Division of the Department of Labor, and finally arrives at the conclusion that a "driver" of trucks used exclusively for the transportation of the mails is entitled to recover under the scale of the Fair Labor Standards Act. Whatever this opinion means, it is not binding upon this court and will not be followed.

In Interpretative Bulletin No. 9, the administrative body charged with enforcement of the Fair Labor Standards Act, the Wage and Hour Division, United States Department of Labor, in a note says that

> "at least three courts have held that in suits under section 16(b), the courts may determine what employees lie within the Commissioner's power to prescribe hours of service and may reach decisions different from those reached by the Commission."[9]

But the Division recognizes that the Commission is endowed with the authority by the statute to fix these classes by inclusion and exclusion and that the Division has no such power, although great weight is accorded its interpretations. Still the Division acts in a broader field and is no expert in a specific field, as is the Commission.

For a single District Judge to attempt to determine the limits of power between administrative agencies in this stricken field of regulation would be to invite the charge of usurpation. Suffice it to say that Congress has given [fol. 52] the authority to the Commission. Whether the "power has been exercised or not is not the question. Any class of employees over which the Commission may exercise the power falls under the express language of the exemp-

[8] 39 F. Supp. 742, 743.

[9] Citing *Missel* v. *Overnight Motor Transportation Co., Inc., supra; West* v. *Smoky Mountains Stages, supra; Magann* v. *Long's Baggage Transfer Co., supra,* above referred to.

tion.[10] The Commission has expressly held that it has the "power" of regulation of the maximum hours of "loaders". If the plaintiffs fall within that classification, then the Commission has already ruled adversely to their contention and it does not lie in the hands of a court constituted such as this one, to correct them. If the Commission has not determined that the class of employees to which plaintiffs belong are "loaders," then they have not excluded plaintiffs from the exercise of jurisdiction, as yet. This court, then, is still without the benefit of a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly . . . ."[11]

If a court now attempts to deal with such a situation, the process must include the construction of the decision of the Commission, in the light of the facts. Congress has indicated that the courts are not primarily equipped to determine what employees affect the safety of such operations by their activities. Therefore, the Commission should say in an appropriate proceeding whether these employees under the peculiar situation fell within or without the classification of "loaders" already established by them, before the court should grant a recovery. Of course, if the Commission decides this question erroneously, there may [fol. 53] be review. But such a tribunal is a specially constituted three-judge court, with a possibility of direct appeal to the Supreme Court of the United States. Whether the industry of transportation of goods in interstate and foreign commerce requires that "loaders", such as plaintiffs, be regulated by the Commission, is a complicated question requiring expert technical treatment, as was said in dealing with a rate situation in *Standard Oil Company (Indiana)* v. *United States*, 283 U. S. 235, 238-9:

> "The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law—but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct

[10] S. 13(b)(1) of the Fair Labor Standards Act of 1938.

[11] Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 315.

> appreciation of a variety of incidents affecting their use. It is evident from an inspection of the record, as the Commission in its first report said, that 'both cases concern unusually complicated and technical tariff situations,' the proper determination of which called for the exercise of the trained judgment of that body of experts, 'appointed by law and informed by experience.' *Illinois Central R. Co.* v. *Interstate Commerce Commision*, 206 U. S. 441, 454. And to that body, in the interest of uniformity, the determination must be left."

The determination of whether the Commission has "power" over the "loaders", who fall in the classification with plaintiffs, is one which will set the pattern for the future and will cover many states of fact, as has the determination that "drivers" are under their authority. The analogies [fol. 54] of *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426, are compelling. Here, as there, expert judgment in the light of pragmatic conditions of operation, should not be hampered by judicial pre-judgment on the circumscribed facts involved in a single case. The criticism of the application thereof, though ably stated, is not convincing.[12]

The parallels between the instant situation and that of rate determination are brought out prominently by consideration of an excellent opinion by Judge Coffey of this court, under title of *Fitzhery* v. *Erie Railroad Company*.[13] There a shipper brought suit to enjoin the railroad from continuing the practice of making progressive charges for truckage and, when freight carried was of a certain weight, making no charge therefor. The contention there was, that such a schedule infringed "the statute itself" and, therefore, the shipper was entitled to injunction without ever having applied to the Commission. It was said in the opinion:

> "It may well be that the line drawn by the defendant between the service for which it does and the service for which it does not make a charge is erroneous. It may even be that it can be established that it is arbi-

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[12] Judge William C. Coleman, in *Missel* v. *Overnight Motor Transportation Co., Inc., supra.*

[13] 7 F. Supp. 880, 883.

trary. The defendant may be unable to sustain the reasonableness or justice of the practice. Whether this be so presents a problem of vast complications. Its solution would involve assembly and consideration of a great mass of facts having an economic bearing and having to do with the way railroad transportation is [fol. 55] carried on, a court, however, is not equipped initially to pass on it. Congress has erected and maintains the commission for the very purpose of conducting the investigations and making the findings needed for reaching intelligent conclusions about such matters. Until those investigations have occurred and those findings are before the court, it is not within its province to entertain lawsuits in which extraneous factors are determinative or even play a part. The philosophy of the foundation on which this proposition rests seems to me never to have been better elucidated than in *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas., 1075, when it was originally announced."

The question is what action should be taken here. Although there is authority to the contrary,[14] the court, in view of the fact that the holding is novel, should permit the cause to retain undismissed, if the plaintiffs indicate a serious intention of having their status fixed by the Commission.

The cause will be held open for further action.
Filed Dec. 20, 1943.
U. S. Dist. Ct. S. D. N. Y.

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[fol. 56] In United States District Court

Notice of Motion

Sir:

Please take notice that upon the annexed affidavit of Deane Ramey, sworn to the 15th day of November, 1944, the affidavit of Leon E. Spielvogel, sworn to the 16th day of November, 1944, and upon all of the other proceedings here-

[14] *Baltimore & Ohio Railroad* v. *Denneye & Co.*, 246 Illinois App. 22, 24.

tofore had herein, the undersigned will move this Court at a Regular Term for Motions to be held in the United States Courthouse, Room 506, located at Foley Square, in the Borough of Manhattan, City and State of New York, on the 28th day of November, 1944 at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order making a final disposition of the above entitled action, and for such other, further and different relief as to the Court may seem proper.

Dated, New York, November 18th, 1944.

Yours, etc., Leon E. Spielvogel, Ramey & McKelvey, of counsel. By Deane Ramey, a member of the firm, Attorneys for Plaintiffs, 501 Fifth Avenue, New York, N. Y. 17.

To: Charles E. Cotterill, Esq., Attorney for Defendant, Office & P. O. Address, 70 East 45th Street, New York 17, N. Y.

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[fol. 57] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEANE RAMEY READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, *ss:*

Deane Ramey, being duly sworn, deposes and says: That I am a member of the law firm of Ramey and McKelvey, appearing of counsel to Leon H. Spielvogel, Esq., the attorney of record for the plaintiffs above named, and submit this affidavit in support of the within application that an order be made and entered herein, either rendering judgment in favor of the plaintiffs or in favor of the defendant and thereby cause a final disposition to be made of the above entitled action which has been pending before this Court and undetermined for a period of almost two years.

The facts and circumstances upon which this application is based are as follows—the defendant is a domestic corporation organized and existing under and by virtue of the laws of the State of New York and was and still is engaged in the business of shipping and transporting by motor truck, goods wares and merchandise in interstate commerce between the State of New York and points outside of the State of New York.

During the period from October 24, 1938 to and including September 1, 1941 the plaintiffs were employed by the defendants in the City of New York to deliver from the defendant's sub-terminals to divers consignees thereof, parcels [fol. 58] and packages which the defendant had transported in interstate commerce. In the regular course of their duties, the plaintiffs likewise called at the places of business of divers firms, persons and corporations and picked up parcels and packages which plaintiffs delivered to defendant's said subterminals for shipment by the defendant in interstate commerce. The said action was commenced by the plaintiffs against the defendant to recover under and pursuant to the Fair Labor Standards Act of 1938 overtime wages and compensation for services which the plaintiffs rendered to the defendant during the said period above mentioned.

After the said action had been pending before this Court for some time, it came on for a pre-trial hearing before Hon. James Alger Fee, a visiting United States District Judge from Oregon, who was sitting in this court at the time. As a result of the said pre-trial hearing, the attorney for the plaintiffs and the attorney for the defendant entered into a written stipulation in which all of the facts were agreed upon. On the basis of this stipulation, Judge Fee signed an order which embodied all of the stipulated facts and provided that the judgment of the Court was to be predicated thereon.

Thereafter and on the 29th day of November, 1943, Judge Fee filed a lengthy opinion in which, among other things, he stated in substance, that in view of the fact that the defendant was under the jurisdiction of the Interstate Commerce Commission, the action should be permitted to remain undismissed "if the plaintiffs indicate a serious intention of having their status fixed by the commission." The opinion made no disposition whatever of the action but on the contrary, made it incumbent upon the plaintiffs to apply to the Interstate Commerce Commission for a ruling on their status as employees of the defendant so as to determine whether or not their activities were such as affected the safety of operation of the defendant's motor vehicles. The burden which [fol. 59] Judge Fee thus placed on the plaintiffs was for the purpose of ascertaining whether or not the said plaintiffs came within the exemption provisions of Section 13 (b) (1) of the Fair Labor Standards Act.

Thereafter and on the 4th day of April 1944 my firm was retained by Mr. Spielvogel, of counsel in the matter and on June 19, 1944 we addressed a letter to Judge Fee, who had returned to Oregon, apprising him of this fact and calling his attention in general to the opinion which we attempted to point out was, in our opinion, erroneous. We also advised Judge Fee that the plaintiffs did not intend to apply to the Interstate Commerce Commission as suggested in his opinion, and we closed this letter by asking Judge Fee to reconsider his opinion and render judgment in favor of the plaintiffs, or to withdraw such opinion and return the file to this Court so that the plaintiffs would have the opportunity of proceeding before other judges who were available. A copy of this letter was addressed to Charles E. Cotterill, Esq., the attorney for the defendant who thereafter forwarded to us a copy of a letter dated June 26, 1944 addressed to Judge Fee in which, among other things, he stated that the Administrator of the Wage & Hour Division of the Department of Labor, as well as the Interstate Commerce Commission, had patterned their current proced re in the light of Judge Fee's opinion. On June 28, 1944 we likewise received a letter from Judge Fee in reply to our letter of June 19th, in which, among other things, he stated:

> "If counsel desire to have a rehearing upon the matter by written briefs submitted here, such a motion will be entertained, otherwise the Court will take no action except to dismiss the cause in accordance with the original opinion."

After receiving Mr. Cotterill's letter in which he advised Judge Fee that the Wage & Hour Division, Department of [fol. 60] Labor, had patterned its procedure in the light of the said opinion, we called it to the attention of Irving Rozen, Esq., Regional Attorney for the Wage & Hour Division, and on August 25, 1944 Mr. Rozen wrote a letter to Judge Fee in which he stated that even though the Wage & Hour Division had no desire to inject itself into this litigation, he believed it necessary to correct the statement which had been made by the defendant's attorney. Mr. Rozen likewise advised that the Administrator has taken the position that the burden of establishing that a person comes within the exemption provision of the Fair Labor Standards Act is upon the person asserting it and that his office did not sub-

scribe to the theory that an employee of a motor carrier must petition the Interstate Commerce Commission for an administrative ruling with respect to his status.

In line with Judge Fee's letter of June 28, 1944 in which he advised that he would consider written briefs upon the matter of a rehearing, we wrote to him on August 28, 1944 and set forth a full discussion regarding our views in the case. We likewise set forth several citations as well as extracts therefrom which we believe supported our position and we asked that our letter of August 28, 1944, together with our previous letter of June 19th be considered as constituting our brief in support of an application for a rehearing. We again advised that the plaintiffs did not intend to apply to the Interstate Commerce Commission to fix their status as employees and closed this letter by saying:

> "We ask Your Honor to reconsider this case in accordance with this and our previous request, but should you not be inclined to alter your former opinion and grant judgment to the plaintiffs, we then ask that your Honor enter a final order which will dispose of the matter as far as the District Court is concerned and thereby enable us to take the case to the Circuit Court of Appeals."

[fol. 61] Thereafter and under the date of October 13, 1944 Judge Fee filed a writing which was termed an opinion but it was in reality nothing more than a criticism of counsel for employing correspondence as a means of seeking a rehearing, as well as a criticism of the Regional Attorney of the Wage and Hour Division for writing the letter above referred to. It made no disposition whatever of the said action and it is now in the same position that it was when the opinion of November 1943 was filed.

As the matter now stands these plaintiffs have been prejudiced and their rights impaired by the Court failing to make a final determination of the case either by granting judgment in favor of the plaintiffs or dismissing the complaint. The attorney for the defendant has made no effort to have the complaint dismissed and I do not believe that he will make any such effort for the reason that it is to the benefit of the defendant to allow this cause to remain in its present uncertain condition.

We have already indicated that the plaintiffs do not intend, neither will they apply to the Interstate Commerce

Commission to fix their status as employees of the defendant and I submit that they are entitled to a final determination of this action on the basis of the stipulated facts hereinbefore mentioned and referred to.

Wherefore I pray that an order be made and entered herein making a final disposition of the said action either by granting judgment in favor of the plaintiffs or by dismissing the complaint so that the plaintiffs will then be able to apply to the Circuit Court of Appeals for the relief which I feel so far has been denied them. I also ask that such other, further and different relief be allowed these plaintiffs as to this Court may seem proper.

Sworn to before me this 15th day of November, 1944.

(Sgd.) Deane Ramey.

(Sworn to November 15, 1944)

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[fol. 62] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LEON E. SPIELVOGEL READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, *ss:*

Leon E. Spielvogel, being duly sworn, deposes and says: That I am the attorney of record for the plaintiffs above named and submit this affidavit in conjunction with the affidavit of Deane Ramey hereto annexed, in support of the within motion that an order be made and entered herein making a final disposition of the within action. That I have read the contents of the affidavit of the said Deane Ramey, hereto annexed, and know the contents thereof to be true. I also state that on April 4, 1944 I retained Mr. Ramey of counsel in this matter and authorized him to adopt such measures as he might deem necessary in this matter. I likewise state that everything that he has done up to this point has been with my knowledge and approval and I join with him in the application for the relief sought herein.

(Sgd.) Leon E. Spielvogel. Filed Feb. 19, 1945. U. S. Dist. Ct. S. D. N. Y. (Sworn to November 16, 1944.)

[fol. 63] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 20-145

OPINION—January 12, 1945

JAMES ALGER FEE, D. J.

This is an action by certain employees against a common carrier by motor in interstate commerce to recover overtime claimed to be due under the provisions of the Fair Labor Standards Act. The court held that there was a technical administrative question involved which must be determined by the Interstate Commerce Commission before a judgment could be rendered for plaintiffs.[1] However, summary judgment of dismissal was not entered and opportunity was given to plaintiffs to present the question to the Commission.

Now, plaintiffs have filed a motion which may be treated as an election not to present the technical question to the Commission, nor to present further pleadings or proofs. No showing has been made to the court that plaintiffs were not employees for whom the Commission may have jurisdiction to prescribe maximum hours of service. There is no showing that the Commission has excluded plaintiffs, or the classes of employees to which each respectively belongs, from the circle of jurisdiction.

[fol. 64] Careful explanation of the action of the court was made in the first opinion in this case, but review of the reasons now seems necessary to avoid misconception. It is contended that in each action of this sort the court must primarily pass upon the question of whether the duties of a particular plaintiff tend "to promote safety of operation" of the motor vehicles involved. But Congress invested the Commission with power to determine that exact question because safety of operation is a "characteristic of transporation" and "inherent in that industry".[2]

The Supreme Court of the United States determined that the Interstate Commerce Commission and the Wages and

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[1] *Ispass* v. *Pyramid Motor Freight Corporation*, 54 F. Supp. 565.

[2] 13 N. C. C. 481, 489.

Hours Division of the Department of Labor were correct in holding that the Commission had the power to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of motor carriers only as to those employees whose duties affect safety of operation. But the Supreme Court did not undertake to pass upon the question of which specific employees performed duties which did affect safety of operation. Nor was this authority committed to other Courts, but was lodged in the commission primarily.[3] We need not debate whether there is a syncretism between the doctrine of "exhaustion of administrative remedies"[4] and the doctrine of "primary jurisdiction,"[5] nor discover how far such doc-
[Vol. 65] trines were fused.[6] It is sufficient to say that the question before the court "demands the exercise of sound administrative discretion requiring the special knowledge, experience, and services of the administrative tribunal to determine technical and intricate matters of fact, and a uniformity of ruling is essential to comply with the purposes of the regulatory statutes administered."[7]

In this field, factual distinctions exist between the conductorette and the dispatcher, the armed guard and the car oiler, the ordinary mechanic and the tarpaulin tailor.[8]

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[3] The effect of a finding of the Commission is not germane to the present discussion.

[4] "The fact that some sort of administrative determination has been made obviously places no barriers across related legislative pathways which remain untrodden." Vom Baur, Federal Administrative Law, Vol. I, Sec. 227.

[5] "Keystone of the arch of administrative regulation is the 'primary jurisdiction' rule." Harv. Law Rev., Vol. 51, p. 1251.

[6] "In both its aspects, exclusive jurisdiction and exhaustion of remedy, it promotes expert analysis and uniform determination of questions of administrative discretion, and through judicial self-limitation it avoids premature interference with the process of administrative regulation." Harv. Law Rev., Vol. 51, p. 1267.

[7] 42 Am. Jur. Sec. 254.

[8] 13 M. C. C. 481.

The courts should not be required to accept the responsibility of such initial determinations. The courts are entitled to the assistance of specialized tribunals for a primary sifting of problems of a technical genesis which result from the complicated nature of an industrialized society.[9] These related doctrines developed out of the attempt of the courts to obtain expert aid in the solution of such technological situations.[10]

[fol. 66] The very crux of this case is the determination, on an involved set of facts, of whether the duties of plaintiffs, or any of them, tend to promote safety of operation of loading and unloading of the vehicles on which they work. The court might perhaps make the correct determination. If it be a duty to decide, the court would have no hesitation. But there should be hesitation in entering the limits of a field which Congress has expressly, and the Supreme Court impliedly, said is too technical to permit of solution by usual rules. Here the answer as to jurisdiction of the Commission and the ultimate solution of the status of the employees are identical. Each depends upon a state of facts which requires technical appraisal for evaluation.[11]

As was pointed out in the previous opinion, a single District Judge should not be so greedy of jurisdiction as to attempt to solve such problems contrary to well established canons of public administrative law. If a breach is to be

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[9] Raoul Berger, "Exhaustion of Administrative Remedies," Yale Law, J., April 1939, No. 6, Volume 48, pp. 981-1606.

[10] The application of such doctrines was authoritatively made in the *Abilene* case (204 U. S. 426), a rate case cited in the former opinion, but ramifications are now met in all fields. "Railroad regulation developed the doctrine, public utility regulation expanded it, tax litigation extended it, and now the rapidly enlarging fields of labor and industrial regulation have adopted it." Harv. Law Rev., Vol. 51, p. 1252, Cf. *Mitchell* v. *United States*, 313 U. S. 80.

[11] Any implications from *Crowell* v. *Benson*, 285 U. S. 22, are not controlling. See *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-1.

made in this wall, it should be accomplished by the higher appellate courts.[12]

This cause should, therefore, not be determined on the basis of the affirmative in the pleadings, nor the incidence of the burden of proof. Nor should a determination be based upon the question of whether a technical exemption is created by the statute as a result of which the proof of [fol. 67] the fact that a plaintiff performs work which promotes the safety of the operation of the motor vehicles falls upon defendant.

Instead, we must assume a position diametrically opposite. We follow the principle that where the creation of a class is left to one administrative body, or any determination of fact involving technical capacity is so delegated, such questions should be there determined before this court proceed to judgment.

The court does not lose jurisdiction because the administrative remedy has not been pursued, but on the other hand, the court need not proceed to a determination until the administrative question be resolved by the appropriate authority.[13]

It is urged vociferously that the court has adopted novel and exotic procedure in this cause to the detriment of plaintiffs. On the contrary the course pursued has been standardized to the point where it can almost be called exclusive. There are two standard methods of disposal of this type of case. In the article on Public Administrative Law in American Jurisprudence,[14] it is said:

> "In applying the doctrine of primary jurisdiction, the court may dismiss the complaint where the question involves an administrative question necessitating pri-

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[12] "The logic of the development of the rule demands a crystallization of its non-discretionary nature in all branches of the doctrine. * * * Were the exhaustion requirement rigorously applied in each instance, much of this wasteful litigation would soon be cut off at the source." Raoul Berger, "Exhaustion of Administrative Remedies," Yale Law J., April 1939, No. 6, Volume 48, 981, 1006.

[13] 42 Am. Jr., p. 699 n. 20; 281 U. S. 412; 259 U. S. 285.

[14] 42 Am. Jr., p. 702, Public Administrative Law, Sec. 254.

mary resort to the administrative tribunal.[15] How-
[fol. 68] ever, the presence of such an administrative question does not deprive the court of jurisdiction,[16] and where there are rights which may be saved by retaining the cause, the court should do so but stay its hand pending the administrative determination." [17]

In the first opinion, the court, conceiving that the plaintiffs had rights which might be saved by retention of the cause, stayed its hand. Since that course of action has provoked violent attacks by plaintiffs,[18] the court now dismisses the action.

Filed Jan. 18, 1945. U. S. Dist. Ct. S. D. N. Y.

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[15] Citing *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. Ed. 771, 61 S. Ct. 498; *St. Louis, B. & M. R. Co.* v. *Brownsville Nav. Dist. 304*, U. S. 295. 82 L. Ed. 1357, 58 S. Ct. 868, rehearing denied in 305 U. S. 668, 83 L. Ed. 433, 59 S. Ct. 55; *Campbell* v. *Milwaukee Electric R. & Light Co.*, 169 Wis. 171, 170 N. W. 937, 6 A. L. R. 628.

[16] Citing *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 325, rehearing denied in 309 U. S. 694, 84 L. Ed. 1035, 60 S. Ct. 465.

[17] Citing *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 325, rehearing denied in 309 U. S. 694, 84 L. Ed. 1035, 60 S. Ct. 465; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 S. Ct. 916.

[18] The court notes this motion was not filed until a memorandum of opinion had been filed calling attention to the fact that extralateral communications with the judge do not constitute proper basis for the determination of litigation. Previously, but after the filing of the main opinion, one of the present attorneys for plaintiffs, who was not then counsel of record, wrote a letter to the trial judge containing expressions verging upon the contemptuous and concluding with the pressure of the remarkable request "that Your Honor resolve this case in favor of the plaintiffs herein, or withdraw your opinion completely, and return the file to this Court so that the plaintiffs may have the opportunity to proceed upon the stipulated facts to judgment either by motion or by trial."

[fol. 69] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 20-145

MURRAY ISPASS, et al., Plaintiffs,

against

PYRAMID MOTOR FREIGHT CORPORATION, Defendant.

ORDER DISMISSING COMPLAINT

The above entitled action having been duly commenced by the plaintiffs for judgment in their favor and against the defendant for overtime compensation under and pursuant to the provisions of the Fair Labor Standards Act of 1938, and the defendant having appeared herein and issue having been duly joined by the filing of the defendant's answer, and the cause having regularly come on for trial before Hon. James Alger Fee, United States District Judge for the District of Oregon, sitting as a visiting judge in this Court, on the 3rd day of May, 1943, and the parties hereto having duly appeared by their respective attorneys, and submitted to the Court, in lieu of the offering of proof, an agreed statement of facts setting forth the issues framed by the complaint, and the Court, upon the consent of the attorneys for the respective parties, having thereupon made and entered an order herein on the said 3rd day of May, 1943, wherein and whereby the said agreed statement of facts which were submitted by the attorneys for the respective parties, as aforesaid, was set forth as the issues framed by the complaint and answer, and the said action having been submitted to the Court for [fol. 70] its determination upon the said agreed statement of facts and order hereinbefore mentioned and referred to, and the Court having thereafter and on the 20th day of December, 1943, filed in the Office of the Clerk of this Court an opinion, bearing date the 29th day of November, 1943, wherein it was stated that the action should be permitted to remain undismissed pending an application by plaintiffs to the Interstate Commerce Commission for a ruling by the Commission regarding their status as employees of the defendant and a determination by the

Commission as to what jurisdiction, if any, the said Commission had power to excercise over the plaintiffs, and the plaintiffs having thereafter indicated their reluctance to adopt the procedure indicated by the said opinion, and having moved this Court for final judgment on the pleadings, and the said motion having regularly come on before this Court on the 28th day of November, 1944 before Hon. John Bright, who thereupon caused the said motion to be referred to the said Hon. James Alger Fee, who thereupon caused to be filed in this Court on the 18th day of January, 1945, an opinion bearing date the 12th day of January, 1945,

Now, on reading and filing the summons and complaint herein, the order of this Court, dated the 3rd day of May, 1943, the opinion dated the 29th day of November, 1943, the notice of motion dated the 18th day of November, 1944, the affidavit of Deane Ramey, sworn to the 15th day of November, 1944, in support of the said notice of motion, and the opinion, dated the 12th day of January, 1945, and due deliberation having been had thereon it is

Ordered that the complaint be and the same hereby is dismissed and that judgment be entered abating and dismissing said action, without prejudice to the rights of plaintiffs, or any one of them, to bring other actions or [fol. 71] proceedings for the establishment of their respective claims, either administratively or at an appropriate time, by action in this court or other proper tribunal.

Dated this 14th day of February, 1945.

James Alger Fee, United States District Judge.

Judgment Rendered, George J. H. Follmer, Clerk, Feb. 19, 1945.

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[fol. 72] In United States District Court

Notice of Appeal

Sir:

Notice is hereby given that the plaintiffs above named hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from an order and judgment made and rendered in this action on the 14th day of February,

1945, in favor of the defendant, Pyramid Motor Freight Corporation and against the plaintiffs, dismissing the complaint herein, and from the whole of the said order and judgment and each and every part thereof.

Dated, New York, March 29, 1945.

Leon E. Spielvogel, Ramey and McKelvey, of Counsel. By (Sgd.) Deane Ramey, A member of the firm, Attorneys for Plaintiffs, Office and P. O. Address, 501 Fifth Avenue, New York, N. Y.

To: Charles E. Cotterill, Esq., Attorney for Defendant, 70 East 45th Street, New York, N. Y., Clerk of United States District Court, Southern District of New York.

[fol. 73] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, Carroll Mackler, Louis H. Shapiro, Sam Lanorith and Joseph Gannon, Plaintiffs-Appellants

against

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Respondent

The plaintiffs-appellants having moved this Court for an order extending their time within which to file the Record on Appeal herein, and the said motion having regularly come on before Hon. August N. Hand, one of the Judges of the Circuit Court of Appeals, Second Circuit, on the 20th day of July, 1945, and due deliberation having been had thereon;

Now, on reading the affidavit of Deane Ramey, sworn to the 19th day of July, 1945, and all the other proceedings herein, it is

Ordered, that the time within which plaintiffs-appellants above named shall have within which to serve and file the Record on Appeal herein, be, and the same hereby is extended to the first day of September, 1945.

Dated: New York, July 20, 1945.

August N. Hand, Judge of the Circuit Court of Appeals, Second Circuit. (Seal.)

[fol. 73a] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

19-908

MURRAY ISPASS, et al., Plaintiffs-Appellants,

-v.-

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Respondent

NOTICE OF MOTION

To the Plaintiffs-Appellants or Their Attorneys:

Notice is hereby given that on October 1, 1945, at the time appointed by the court for such a purpose, the defendant-respondent in the above-entitled case will present to the United States Circuit Court of Appeals for the Second Circuit at the Federal Court House, Foley Square, Borough of Manhattan, City of New York, its motion to dismiss the appeal for the reasons stated in such motion a copy of which is annexed hereto.

(Sgd.) Charles E. Cotterill, 70 East 45th Street, New York, N. Y., Attorney for defendant-respondent.

September 5, 1945.

Service hereof acknowledged this 6th day of Sept., 1945.
(Sgd.) Ramey & McKelvey, Attorneys for plaintiffs-appellants.

[fol. 74] UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT

Docket No. 19-908.

MURRAY ISPASS, et al., Plaintiffs-Appellants,

v.

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Respondent

AMENDED MOTION OF DEFENDANT TO DISMISS APPEAL

Comes now the defendant-respondent, Pyramid Motor Freight Corporation, and respectfully moves that the appeal herein be dismissed for the following reasons:

1. The plaintiffs-appellants did not, within the time prescribed by act of Congress, docket their appeal and make and file a transcript of the record before the court below.

2. The plaintiffs-appellants, before the expiration of the time prescribed by act of Congress for docketing an appeal and making and filing a transcript of record before the court below, did not make application to the court below for an extension of time within which to do so.

3. It is not within the authority of the United States Circuit Court of Appeals, under the circumstances, to extend the time for docketing the appeal and making and filing such transcript of record.

4. Application to the Circuit Court of Appeals for an extension of time merely as to the record was not made until more than ninety (90) days after plaintiffs-appellants' notice of appeal. Therefore this court does not possess authority to extend the time for docketing the appeal and making and filing the transcript of record.

[fol. 75] 5. Even if such authority existed in this court it was not within the authority of any one Judge thereof (Hon. August N. Hand) to make and enter on July 20, 1945, an order so extending the time for making and filing the record on appeal on or before September 1, 1945.

6. If this court or any one member thereof possessed such authority, under the circumstances, its exercise is required to be governed by sound judicial determinations and is not a mere matter of discretion. The affidavit of one of the attorneys for plaintiffs-appellants in support of the application for extension of time, upon which the order of Judge Hand was made July 20, 1945, does not set forth any facts showing an excusable reason for the failure of plaintiffs-appellants or for counsel to have filed the record on appeal within the time otherwise prescribed by act of Congress.

(Sgd.) Charles E. Cotterill, 70 East 45th St., New York, N. Y., Attorney for Defendant-Respondent.

September 24, 1945.

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[fol. 76] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Civil Action No. 19-908

MURRAY ISPASS, et al., Plaintiffs-Appellants,

v.

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Respondent

MOTION OF DEFENDANT TO DISMISS APPEAL

Comes now the defendant-respondent, Pyramid Motor Freight Corporation, and respectfully moves that the appeal herein be dismissed for the following reasons:

1. The plaintiffs-appellants did not, within the time prescribed by act of Congress, make and file a transcript of the record before the court below.

2. The plaintiffs-appellants, before the expiration of the time prescribed by act of Congress for making and filing a transcript of record before the court below, did not make application to the court below for an extension of time within which to do so.

3. It is not within the authority of the United States Circuit Court of Appeals, under the circumstances, to extend the time for making and filing such transcript of record.

4. Application to the court for an extension of time was not made until more than ninety (90) days after plaintiffs-appellants' notice of appeal. Therefore this court does not possess authority to extend the time for making and filing the transcript of record.

[fol. 77] 5. Even if such authority existed in this court it was not within the authority of any one Judge thereof (Hon. August N. Hand) to make and enter on July 20, 1945, an order so extending the time for making and filing the record on appeal on or before September 1, 1945.

6. If this court or any one member thereof possessed such authority, under the circumstances, its exercise is required to be governed by sound judicial determinations and is not a mere matter of discretion. The affidavit of one of the attorneys for plaintiffs-appellants in support of the application for extension of time, upon which the order of Judge Hand was made July 20, 1945, does not set forth any facts showing an excusable reason for the failure of plaintiffs-appellants or for counsel to have filed the record on appeal within the time otherwise prescribed by act of Congress.

(Sgd.) Charles E. Cotterill, 70 East 45th St., New York, N. Y., Attorney for Defendant-Respondent.

August 13, 1945.

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[fol. 78] UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT

MURRAY ISPASS, et al., Plaintiffs-Appellants,

Docket No. 19-908

v.

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Respondent

AFFIDAVIT

I, Charles E. Cotterill, attorney at law and a member of the bar of this court, having my professional office at 3722 Grand Central Terminal Building, 70 East 45th Street,

New York City, and being the attorney of record for the defendant in the above-entitled action, on oath say:

In this action the attorneys of record for the plaintiffs were and are Leon E. Spielvogel and Benjamin C. Klores. On November 29, 1943, Hon. James Alger Fee, then sitting as a United States District Judge for the Southern District of New York, rendered his opinion in this action. According thereto it was determined by him that the character of labor performed by the plaintiffs at the time they were within defendant's employment, was "within the power" of the Interstate Commerce Commission to prescribe for them their maximum hours of employment, that whether or not the character of such labor affected safety of operation of motor vehicles presented an administrative question within the authority of the Interstate Commission, but that the action would not then be dismissed if the plaintiffs showed any disposition to approach the Interstate Commerce Commission for a different determination of their status.

Neither the plaintiffs nor their attorney of record did so proceed before the Interstate Commerce Commission at any time.

[fol. 79] Nearly a year later the attorneys of record for the plaintiffs together with Ramey and McKelvey, then brought in only by Attorney Spielvogel as "Of Counsel to Mr. Spielvogel", began to bombard Judge Fee with caustic critical letters addressed to him in Oregon denouncing his action of about one year previous and saying to him he should revoke his opinion.

Judge Fee thereupon prepared and filed as a part of the record in the case his declaration of the impropriety of the conduct of plaintiffs' attorneys and directing that their correspondence with him, and his admonitory declaration, be made a part of the judicial file in the action.

On November 18, 1944, attorneys for the plaintiffs moved for final disposition of their action upon their declaration that they had not done so and would not avail their administrative remedy before the Interstate Commerce Commission.

Bearing date of January 12, 1945, Judge Fee thereupon rendered a further opinion affirming his original conclusion, directing dismissal of the action, and describing the conduct of the attorneys as "virtually contemptuous".

Thereupon judgment of dismissal was entered February 14, 1945.

Notice of appeal was given April 2, 1945.

But each of the four attorneys for the plaintiffs neglected to docket the case in the Court of Appeals and to file within forty days thereafter the record on appeal, or within that period of forty days to apply to the United States District Court for an extension of time within which to do so.

Attorney Ramey on July 18, 1945, more than ninety days after the notice of appeal, tendered the record to the Clerk of the District Court for certification. Even had Mr. Ramey or his associate, Mr. McKelvey, applied for and obtained an extension from the District Court (which neither did) such an extension would have expired on July 3, 1945.

[fol. 80] More than ninety days after the notice of appeal (on July 20, 1945) the firm of Ramey and McKelvey applied to one of the members of this honorable court for an order extending the time within which they might so file the record on appeal. No application for an extension of time for docketing was ever made.

July 20, 1945, Hon. Augustus Hand, a member of this court, passed such an order.

In support of their application to this court for an extension of time, filed more than ninety days after the notice of appeal, a member of the firm of Ramey and McKelvey, in an affidavit, recited nothing more by way of excuse for the neglect than that he had thought his partner had attended to the securing of an extension from the District Court and his partner had thought Mr. Ramey had done so. Why the attorneys of record, Messrs. Spielvogel and Klores, had not attended to the record or an extension of time was not stated in that or any other showing to the court.

Nearly two years have elapsed since the determination of Judge Fee that the plaintiffs had no judicial remedy. During the time when the action was pending before Judge Fee the defendant company carried on its books of account a reserve for any contingent liability. In view of the outcome before Judge Fee in 1943 and the failure of counsel for the plaintiffs during nearly one year to take any further steps in the matter defendant company cancelled the reserve and has since paid corporate taxes thereon as income.

The defendant has moved to dismiss this appeal on the grounds that there is a want of authority in the Circuit Court of Appeals to entertain it at any time or of one member or a majority of the members of this court to extend the time for docketing the case and filing the record upon an application and order made more than ninety days after the notice of appeal. Such motion is further grounded upon [fol. 81] the contention that the neglect of the various attorneys for the plaintiffs in not docketing the case and filing the record within the time appointed by law was not excusable within judicial cognizance or sound judicial discretion.

(Sgd.) Charles E. Cotterill, 70 East 45th St., New York, N. Y., Attorney for Defendant-Respondent.

September 24, 1945.

Sworn to and subscribed before me a Notary Public in and for the County of New York. (Sgd.) Helen A. Walsh, Notary Public, Kings Co. No. 287, Reg. No. 203-W-7. Certificate filed in New York County, N. Y. Co. Clerk's No. 15, Register's No. 280-W-7. Commission expires March 30, 1947. (Seal.)

September 24, 1945.

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[fol. 82] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Docket No. 19-908

MURRAY ISPASS, et al., Plaintiffs-Appellants,

v.

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Respondent

SUPPLEMENTAL AFFIDAVIT OF COUNSEL FOR THE DEFENDANT

STATE OF NEW YORK,
County of New York, ss:

Charles E. Cotterill, being duly sworn deposes and says: that he has been from the beginning and remains the sole attorney of record for the defendant-respondent in the

described action, that on this day, September 28, 1945, he received from Leon E. Spielvogel, one of the two attorneys of record for the plaintiffs-appellants, and from Deane Ramey, "Of counsel to Mr. Spielvogel", a notice that upon the return date (October 1, 1945) of the defendant-respondent's motion to dismiss the appeal, such attorneys will move this court for an adjournment thereof "to the date of the argument of the said appeal, or for such other date as will afford the undersigned an opportunity to prepare and submit to the said court a brief or other papers in opposition thereto". Accompanying that notice of intended motion is an affidavit of Mr. Deane Ramey who describes himself as a member of the firm of Ramey and McKelvey, the attorneys who are appearing and prosecuting this appeal as "Of counsel" to the attorneys of record for the plaintiffs-[fol. 83] appellants. Neither Mr. Ramey nor the firm of Ramey and McKelvey makes any claim to be attorneys or attorneys of record for the plaintiffs-appellants.

The defendant-respondent served on the 6th day of September, 1945, its notice of motion, returnable October 1, 1945, to dismiss the appeal.

On September 25, 1945, as a professional courtesy, defendant-respondent transmitted to Mr. Ramey a copy of b f in support of the dismissal motion intended to be filed with this court upon the hearing of the dismissal motion October 1.

In the affidavit of Mr. Ramey, dated September 27, 1945, in support of his intended motion to adjourn the hearing and consideration of the motion to dismiss the appeal, nothing is said further in support of that intended motion except that commencing September 24, Mr. Ramey began to await assignment to a Part in the Supreme Court of the State of New York, County of New York, to conduct a trial and that such assignment was made and the trial would actually commence on September 27. It is said further that Mr. Ramey has another trial in the State court on Friday, September 28.

Inasmuch as the motion to dismiss the appeal was served on September 6, 1945, made returnable October 1, 1945, the fact that Mr. Ramey, not an attorney of record in the action, became engaged during the last week of September in State court trial work affords no excuse for adjournment of the hearing and consideration of the defendant-appel-

lee's motion to dismiss the appeal. It is not said by Mr. Ramey that he is to be engaged in State court trial work October 1, the return date of the dismissal motion. Having [fols. 84-85] accepted service of notice of dismissal motion on September 6, 1945, returnable October 1, Mr. Ramey had the entire time between then and September 25 to prepare himself for argument on the dismissal motion October 1.

No showing is made by Mr. Spielvogel, the only apparent attorney of record for the plaintiffs-appellants, as to why dismissal motion should not be argued and taken under advisement on October 1 as now provided by the notice of dismissal motion.

It is said by Mr. Ramey that in the brief of counsel for the defendant-appellee in support of the dismissal motion there is argued the rightness of the decision of the court below dismissing the action. That is not so. The defendant's brief in that respect goes no further into the merit of the case in the court below than to point out that there was no obvious error committed by the District Court in dismissing the action. Defendant has not prepared its brief on the merit of the case in the court below.

(Sgd.) Charles E. Cotterill, Attorney for defendant-respondent.

September 28, 1945.

Sworn to and subscribed before me a Notary Public in and for the County of New York. (Sgd.) Helen A. Walsh, Notary Public, Kings Co. No. 287, Reg. No. 203-W-7. Certificate filed in New York County, N. Y. Co. Clerk's No. 15, Register's No. 280-W-7. Commission expires March 30, 1947. (Seal.)

September 28, 1945.

[fol. 86] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 10th day of October, one thousand nine hundred and forty-five.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Charles E. Clark, Circuit Judges.

MURRAY ISPASS, et al., Plaintiff-Appellants,

v.

PYRAMID MOTOR FREIGHT CORPORATION, Defendant-Appellee

A motion having been made herein by counsel for the appellee to dismiss the appeal,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Alexander M. Bell, Clerk.

[fol. 87] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Murray Ispass, et al., v. Pyramid Motor Freight Corporation. Order. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 10, 1945. Alexander M. Bell, Clerk.

[fol. 88] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 89

(Argued November 13, 1945. Decided December 28, 1945)

Docket No. 19908

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, Carroll Mackler, Louis H. Shapiro, Sam Lanorith and Joseph Gannon, Plaintiffs-Appellants,

v.

PYRAMID MOTOR FREIGHT CORP., Defendant-Appellee

Before L. Hand, Swan and Frank, Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York

Action to recover unpaid overtime compensation, liquidated damages and attorney's fees under the Fair Labor Standards Act of 1938, 29 U. S. C. A. § 201 *et seq.* From a judgment dismissing their complaint, 59 F. Supp. 341, the plaintiffs appeal. Reversed in part; affirmed in part.

[fol. 89] Leon E. Spielvogel, Attorney for appellants; Ramey & McKelvey, of counsel.

Charles E. Cotterill, Attorney for appellees.

SWAN, Circuit Judge:

This is an action under § 16b of the Fair Labor Standards Act, 29 U. S. C. A. § 216(b), to recover unpaid overtime compensation, liquidated damages and attorney's fees. It was commenced in the City Court of the City of New York, was removed by the defendant to the District Court, and was tried to the court without a jury upon an agreed statement of facts. The plaintiffs are employees of the defendant, a common carrier by motor truck of interstate freight, and the issues framed for trial were whether they were within the coverage of section 7 of the Act, 29 U. S. C. A. § 207, or were exempted therefrom by section 13(b)(1), 29 U. S. C. A. § 213(b)(1), as employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of

service pursuant to the provisions of [illegible]04 of Title 49." Because of doubt on the basis of the agreed facts whether the plaintiffs were subject to the jurisdiction of the Interstate Commerce Commission, the trial judge was of the opinion that decision should be held in abeyance in order that they might have an opportunity to apply to the Commission to fix their status. *Ispass* v. *Pyramid Motor Freight Corp.*, 54 F. Supp. 565. Thereafter the plaintiffs moved for a final disposition of the case, and the trial judge, treating the motion as an election not to apply to the Commission or to present further pleadings or proof, entered an order dismissing the complaint. 59 F. Supp. 341. From this judgment the plaintiffs have appealed.

[fol. 90] Before passing to the merits we consider the appellee's motion to dismiss the appeal. The judgment was entered February 19, 1945. Notice of appeal was duly filed March 29th, but nothing was done to docket the appeal in this court and file the record therein, or to obtain an extension of time from either the district court or this court until July 20th, when an order was obtained from a judge of this court extending the appellant's time to file the record on appeal until September 1, 1945. On that date the record and the appellants' brief were filed. A motion by the appellee to dismiss the appeal was denied from the bench in October and is now renewed. It is urged that under Rule 73(g) F. R. C. P. only the district court possesses jurisdiction to extend the time to docket an appeal and file the record on appeal. But Rule 73(a) provides that a party may appeal by filing with the district court a notice of appeal and that failure of the appellant to take further steps "does not affect the validity of the appeal, but is ground * * * for such action as the appellate court deems appropriate, which may include dismissal of the appeal." Hence the jurisdiction of the appellate court attaches at the time of filing the notice of appeal and whether a dilatory appellant shall be allowed to proceed is a matter within its discretion. *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83 (C. C. A. 3); *Mutual Benefit Health & Accident Ass'n* v. *Snyder*, 109 F. 2d 469 (C. C. A. 6); *Burke* v. *Canfield*, 111 F. 2d 526 (C. A. D. C.). In the case at bar there was no abuse of discretion in extending the time, despite the somewhat feeble excuses for delay, since the appeal presents a substantial question as to the correctness of the judgment. The motion to dismiss is denied.

In construing section 304(a)(1) and (2) of Title 49 the Supreme Court has limited the regulatory power of the [fol. 91] Commission to those employees whose activities affect the safety of operation of motor vehicles. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 553. But it is the existence, not the exercise, of the power that determines their exemption under section 213(b)(1) of Title 29. *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44. In *Maximum Hours of Service of Motor Carrier Employees*, 28 M. C. C. 125, the Commission ruled that "loaders" and "helpers", as well as drivers, of motor trucks are subject to its jurisdiction, because the way a truck is loaded affects the safety of its operation. The appellants contend that their activities bring them within this ruling. We must therefore consider the evidence, bearing in mind that the burden of proof is upon the defendant to show which, if any, of its employees are within the exemption. *Helliwell* v. *Haberman*, 140 F. 2d 833, 834 (C. C. A. 2); *Walling* v. *Comet Carriers*, 151 F. 2d 107, 110 (C. C. A. 2); *cf. Stratton* v. *Farmers Produce Co.*, F. 2d 825, 827 (C. C. A. 8).

Laying aside for the moment the case of the plaintiff Shapiro, the agreed statement as to the other plaintiffs is to the following effect: The defendant maintains a main terminal on West 11th Street and a sub-terminal on West 38th Street for the convenience of its customers in the Garment Center of New York City. In the case of northbound (*i. e.*, incoming) trucks, as the helper on the truck pushes the freight packages over the tailboard they are received by the plaintiffs, who place them in the subterminal building, and later in the day deliver them to the various consignees by means of hand-trucks or flat trucks which they push. Sometimes the north-bound trucks by-pass the sub-terminal and stop along the curb in the Garment Center; in such cases the unloading is performed in the same manner as at [fol. 92] the sub-terminal and the plaintiffs then deliver the packages by hand or hand-truck into the buildings in the Garment Center. In the case of south-bound (*i. e.*, outgoing) trucks, some of the freight packages are picked up by the plaintiffs at the consignors' places of business and hand-trucked to the sub-terminal where the plaintiffs "physically load the freight packages into a waiting truck" which proceeds, when loaded, to the main terminal where a new driver is taken on for the journey to destinations south of New York. A down-town employee other than the

plaintiffs also takes part in loading the vehicles at the subterminal. Sometimes trucks for south-bound loadings take up stations on the public streets in the Garment Center where the plaintiffs bring the packages by hand or hand-truck; in such cases the part taken by the plaintiffs in loading consists in lifting the packages to the tailboard "and very often when the weights or size of the packages so required they would stand inside the truck bodies and, together with the down-town employee, stack and pile the freight in the vehicle." All of the plaintiffs other than Shapiro generally walked between stopping points but occasionally in order to save time, rode upon the truck when it moved from one place to another in the Garment Center.

It seems clear that the unloading activities of the plaintiffs would not bring them within the jurisdiction of the Commission because after the down-town helper pushes the packages over the tailboard their effect upon the safety of operation of the truck ceases. On the other hand the plaintiffs' part in loading the trucks does concern safety of operation. Merely lifting the packages on to the tailboard may not; but when they stand inside the truck body and help the down-town employee to "stack and pile the freight in the vehicle," they act as "loaders" and would come within the Commission's jurisdiction if these duties [fol. 93] occupied a substantial part of their time. In 28 M. C. C. at 131 the Commission said that "we have concluded that we should not assert jurisdiction as to employees who spend an unsubstantial part of their time in performing duties which affect the safety of operation of motor vehicles." It is not clear whether the Commission thought it lacked the power to assert jurisdiction or in the exercise of discretion refused to assert power. We think the former is the correct view. See *Walling* v. *Comet Carriers*, 151 F. 2d 107, 111 (C. C. A. 2); *Levinson* v. *Spector Motor Service*, 389 Ill. 466, cert. granted 14 U. S. Law Week 3126. Upon this record the defendant has not carried the burden of showing that "loading" occupies a substantial part of the working time of the plaintiffs. Accordingly the judgment of dismissal must be reversed and the cause remanded for entry of judgment in their favor and for allowance of an attorney's fee.

As to Shapiro the stipulation states that he regularly and as a matter of fixed duty rode on the truck between

four and five hours daily. On the truck at the same time was the driver and a helper from the main terminal. In addition Shapiro devoted three and a half hours daily to inside office work at the subterminal. Since Chapiro rode the truck for a substantial part of his working time he is a "helper" within the Commission's ruling in 28 M. C. C. at pp. 135-6. As to him the judgment of dismissal is affirmed.

As to the other plaintiffs the judgment is reversed and the cause remanded. An allowance of $200 is awarded to the plaintiffs' attorney for services on the appeal.

[fol. 94] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of December one thousand nine hundred and forty-five.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

MURRAY ISPASS, et al., Plaintiffs-Appellants,

v.

PYRAMID MOTOR FREIGHT CORP., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court as to Shapiro be and it hereby is affirmed; and the judgment as to the other plaintiffs be and it hereby is reversed with costs and cause remanded in accordance with the opinion of this court.

It is further ordered that an allowance of $200. be and it hereby is awarded to the plaintiffs' attorney for services on the appeal.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 95] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Murray Ispass, et al., v. Pyramid Motor Freight Corp. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 28, 1945. Alexander M. Bell, Clerk.

[fol. 96] Clerk's Certificate to foregoing transcript omitted in printing. (Seal.)

[fol. 90] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 25, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket and set for argument before a full bench immediately to follow No. 609.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.